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COUNTER-CASE

PRESENTED ON THE PART OF THE

GOVERNMENT OF HER BRITANNIC MAJESTY

TO THE

TRIBUNAL OF ARBITRATION

CONSTITUTED UNDER ARTICLE I OF THE TREATY CONCLUDED AT WASHINGTON ON THE 29TH FEBRUARY, 1892,

BETWEEN

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HER BRITANNIC MAJESTY AND THE UNITED STATES OF AMERICA.

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Counter-Case presented on behalf of Her Britannic Majesty's Government to the Tribunal of Arbitration.

PRELIMINARY STATEMENT.

A PRELIMINARY statement as to the general scheme and construction of the following Counter-Case may be of assistance in its perusal.

For convenience of reference, and in the interests of brevity, it has been found desirable in framing the Counter-Case to follow the arrangement which was adopted in the British Case; as, on perusal of the United States' Case, it was observed that the arrangement of the argument contained in the First Part of that Case; namely, that relating to historical and jurisdictional questions, corresponded in a general way with the sub-division of chapters adopted in the British Case. In the following Counter-Case, therefore, there has been placed at the head of each chapter the heading which will be found for the corresponding chapter in the British Case. But inasmuch as the propositions relating to each point appear in the United States' Case not unfrequently in more than one passage, there have been added to each heading citations from the United States' Case of the propositions put forward in argument on behalf of the United States bearing upon the subject, with a reference to the page of the United States' Case from which such citations are taken. In addition there has been placed immediately following, at the head of each chapter, a brief summary of the arguments in reply which are advanced on behalf of the Government of Her Britannic Majesty.

Repetition of the points made in the British Case has, as far as possible, been avoided; though the reply to the United States' Case involves, of necessity, in some cases, reference to arguments which had already been urged on behalf of Great Britain.

Marginal references to the corresponding passages in the British Case are given.

The first four points submitted in Article VI of the Treaty of the 29th February, 1892, are first dealt with under the various heads above referred to in Chapters I to V.

The fifth question of Article VI, viz.:—"Has the United States any right, and, if so, what right, of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary 3-mile limit?" has been so treated in the United States' Case, that in preparing this Counter-Case a somewhat different course to that pursued in relation to the first four questions has been rendered necessary. It will be observed that on page 85 of the United States' Case, it is asserted that, quite independently of the jurisdiction over Behring Sea, which was established or exercised by Russia prior and up to the time of the cession of Alaska, the Government of the United States has a "right of protection and property in the fur-seals frequenting the Pribyloff Islands when found outside the ordinary 3-mile limit"; and it bases this right "upon the established principles of the common and the civil law, upon the practice of nations, upon the laws of natural history, and upon the common interests of mankind."

No arguments are adduced in the United States' Case based upon the first of these suggested grounds, viz., the principles of the common and the civil law. But in this Counter-Case, it is proposed in the first instance to deal with the unprecedented nature of the claim, having regard to those principles, and also to reply to the arguments which are adduced, founded upon an alleged practice of nations. This branch of the Case is treated in Chapter VI.

The laws of natural history and the common interests of mankind have, it is submitted, no bearing upon, or relevance in connection with, the question as to the right of protection or property claimed by the United States, to the exclusion of other nations. But as the Government of Her Britannic Majesty contend that the facts alleged as to the natural history of seals, and as bearing upon the common interests of mankind, are wholly, or, to a great extent, inaccurate, these subjects are dealt with in the various sections of Chapter VII.

It has not been found necessary to make any additional observations in reference to Chapters VI and VII of the British Case; viz., the action of the United States and Russia from 1867 to 1886, and the various contentions of the United States since the year 1886.

The above subjects are treated of in Part I of this Counter-Case.

The subject of the Regulations (if any) which are necessary, and the waters over which the Regulations should extend, referred to in Article VII of the Treaty, is considered in Part II. For reasons more explicitly stated in correspondence which will be found in the Appendix, the consideration of this point has been treated in this Counter-Case, but only in deference to the wish expressed by the United States that arguments upon all the questions with which the Arbitrators may have to deal should be placed before the Tribunal by means of the Case and Counter-Case. The Government of Her Britannic Majesty have adduced these arguments under protest, and without prejudice to their contention that the Arbitrators cannot enter upon or consider the question of the proposed International Regulations until they have adjudicated upon the five questions enumerated in Article VI, upon which they are by the terms of the Treaty required to give a distinct decision; and upon the determination of which alone depends the question whether they shall enter upon the subject of Regulations. Her Majesty's Government reserve also their right to adduce further evidence on this subject, should the nature of the arguments contained in the Counter-Case on behalf of the United States render such a course necessary or expedient.

See Appendix, vol. i, pp. 1 *et seq.*

PART I.

INTRODUCTION.

BEFORE proceeding to discuss in detail the disputed points raised by the United States' Case, it is deemed necessary to refer to the translations of the various Russian documents used and cited in the Case presented on the part of the United States. These consist for the most part of documents belonging to the Official Records or Archives of the Russian-American Company, which were handed over to the United States by Russia under the Treaty of 1867, by virtue of the IInd Article of that Treaty. The original documents are deposited in the Archives of the Department of State at Washington, and have not heretofore been made public.

The translations are set out at pp. 49 to 90, vol. i, of the United States' Appendix, and are quoted at pp. 41, 42, 43, 44, 45, 46, 47, 48, 49, 54, 55, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 103, and 104 of the Case.

Fac-similes of the originals are given at the end of vol. i of the Appendix to the United States' Case.

Upon the first perusal of the extracts included in the United States' Case, certain passages were observed which at once gave rise to the impression that the papers must have been faultily translated. The fac-similes supplied in the Appendix were consequently examined by a competent Russian scholar in the confidential employment of Her Majesty's Government, and a large number of errors and interpolations were discovered of a most important kind. Some few of these were apparently purposeless, but the great majority were of such a nature that they could only be accounted for on the supposition that some person had deliberately falsified the translations in a sense favourable to the contentions of the United States. The matter seemed of so much importance that steps were taken to obtain an independent translation by another hand,

which was completed in October, and entirely confirmed the previous impression.

The United States' Government independently came to the knowledge of the fact at the beginning of November, and their Agent has given the explanation of it in a communication addressed to the Arbitrators and to the British Agent on the 19th of that month. The United States' Agent at the same time gave notice of the withdrawal of a certain number of the documents, and furnished revised translations of the others. Her Majesty's Government have pleasure in acknowledging that these revised translations, with the exception of one or two small errors of no moment, are perfectly accurate. But there are statements and arguments in the Case founded on the original translations, or depending mainly on them for support, which still remain to be answered, and it will therefore be necessary in the proper place to draw attention to the translations and original documents.

It is not possible, by a mere comparison of the correct and the erroneous translations, to form an accurate opinion of the effect of the insertion of the fictitious and interpolated passages upon the argument contained in the Case for the United States.* Attention will therefore be called, in connection with each branch of the subject, to the manner in which it depends upon such interpolations and errors. When the spurious passages are expunged, and the erroneous translations corrected, it will be found that no evidence remains to support the contentions of the United States (*a*) that the Russian Government and the Russian-American Company claimed and exercised exclusive jurisdiction as to trading and hunting in the Behring Sea, and (*b*) that the Ukase of 1821 was merely declaratory of pre-existing claims which had been enforced therein for many years. The alleged pre-existing claims and their enforcement for many years, so far as they implied any extraordinary maritime jurisdiction, are merely the creations of the translator.

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* For convenience of reference, the original translations furnished by the United States have been printed in parallel columns with the revised translations, and are given in the Appendix to this Counter-Case. (Appendix, vol. i, pp. 11-55.)

CHAPTER I.

HEAD (A).—*The User up to the year* 1821 *of the Waters of Behring Sea and other Waters of the North Pacific.*

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 25—
"By first discovery, occupation, and permanent colonization, the shores and islands of Bering Sea, the Aleutian chain, and the Peninsula of Alaska became, probably as early as 1800, an undisputed part of the territory of the Russian Empire."

(2.) United States' Case, p. 26—
"While the title of Russia to the territory north and west of, and including, the Peninsula of Alaska, was universally recognized, her claim to the North-west Coast of the American Continent . . . . was earnestly disputed by more than one powerful nation."

(3.) United States' Case, p. 33—
"While the claim of Russia to the territory embracing the Aleutian Islands, the Peninsula of Alaska, and the coasts and islands of Bering Sea was undisputed, the shores and the adjacent islands of the American Continent south of latitude 60° as far as California, were during the latter part of the eighteenth and the first quarter of the present century the subject of conflicting claims on the part of Russia, Great Britain, Spain, and the United States."

(4.) United States' Case, p. 42—
"After the Ukase or Charter of 1799, granting to the Russian American Company certain exclusive control of trade and colonization, its authorities, acting under the sanction of the Russian Government, did not permit foreign vessels to visit Bering Sea."

(5.) United States' Case, p. 49—
"The Ukase of 1799, which set forth a claim of exclusive Russian jurisdiction as far south as latitude 55°, called forth no protest from any foreign Powers, nor was objection offered to the exclusion of foreign ships from trade with the natives and hunting fur-bearing animals in the waters of Bering Sea and on the Aleutian Islands as a result of that Ukase and of the grant of exclusive privileges to the Russian-American Company."

(6.) United States' Case p. 69—
"Prior and up to the date of the treaties of 1824 and 1825, Russia did assert and exercise exclusive rights of commerce, hunting, and fishing on the shores and in all the waters of Bering Sea."

SUMMARY OF BRITISH REPLY.

The title said in Contention (2.) to have been "universally recognized," is not shown to have been recognized at all during the period in question. Her only Settlement north of the Aleutian Islands was Nushagak, with five Russian inhabitants, founded in 1818. Any title by discovery was open to doubt. There was none by occupation or colonization.

Throughout the evidence which relates to this period, no distinction, as regards the title of Russia or its recognition by other nations, is drawn between coasts north and south of latitude 60°.

The Ukase of 1799 purported to grant the Russian-American Company rights exclusive of other Russian subjects, but not of foreigners; such exclusive rights were only exercisable on land; no exclusion of foreign vessels from Behring Sea, or from fur-hunting there, is shown; and the only evidence adduced of the sanction of the Russian Government to any such course, consists in the interpolations, since withdrawn, of a translator in contemporary documents.

The Ukase of 1799 was not notified to foreign Powers, and had no operation as against foreigners.

The only assertion by Russia of exclusive rights in Behring Sea was in 1821, and that on paper merely.

Contention that Russian title to eastern shores of Behring Sea was undisputed.

No distinction in Russia's title at latitude 60°.

THE first three contentions, of which, save for the mention of latitude 60° in the third, the second and third are for the present purpose substantially identical, may be dealt with together; premising that, prior to the year 1821, no distinction, as regards the title of Russia, had been drawn between coasts north and south of that latitude; nor will any hint of such distinction be found throughout the evidence which relates to the period now in question.

No evidence of recognition of her title.

There is, prior to 1824, no evidence of recognition by any nation of the claim of Russia to the eastern shores of Behring Sea. Their outlines were unknown to geographers before the explorations of Cook in 1778 and 1779, and there is practically no evidence of any assertion of "right of dominion" over them by Russia prior to the Ukase of 1799, which apparently bases this right on "discovery by Russian navigators in remote times." The translation of that Ukase in the British, and United States' Cases, which was taken from Bancroft's "History of Alaska," alleges "right of possession" by Russia; but these words are wanting in the original, of which a correct translation is given in the present Counter-Case.

See *post*, p. 11

United States' Case, p. 24.

The authority of Captain Cook is invoked as proving the existence of "Russian influence and customs" upon the eastern shores of Behring Sea. Even if he had found instances of Russian "influence and customs," this would not prove Russian occupation or possession of this very extensive line of coast. But his narrative, on the contrary, shows that along the whole coast-line

he met with no Russians or other civilized people, but only with tribes of the native inhabitants. Captain Cook further states that the Russians he met at Unalaska were— Cook's Voyage, vol. ii, p. 496.

"strangers to every part of the American coast, except what lies opposite this island."

At Samganoodha, on the Island of Unalaska Captain Cook met a Russian named Erafim Gregorioff Sin Ismyloff, whom he describes as the principal person amongst his countrymen in this and the neighbouring islands; and with reference to the continent north of Unalaska, Captain Cook says:— Ibid., p. 499.

"Both Ismyloff and the others affirmed, that they knew nothing of the continent of America to the northward; and that neither Lieutenant Synd, nor any other Russian, had ever seen it of late. . . . . From what we could gather from Ismyloff and his countrymen, the Russians have made several attempts to get a footing upon that part of this continent, that lies contiguous to Oonalashka and the adjoining islands, but have always been repulsed by the natives; whom they describe as a very treacherous people."

Captain Cook further observes:— Ibid., p. 498.

"I found that he [Ismyloff] was very well acquainted with the geography of these parts, and with all the discoveries that had been made in them by the Russians."

Ismyloff furnished Captain Cook with Charts, as to one of which he writes:— Ibid., p. 502.

"The second chart . . . . comprehended all the discoveries made by the Russians to the eastward of Kamtschatka toward America; which, if we exclude the voyage of Beering and Tscherikoff, will amount to little or nothing."

The writer says, in conclusion:— Ibid., p. 506.

"They assured me, over and over again, that they knew of no other islands, besides those which were laid down upon this chart; and that no Russian had ever seen any part of the continent of America to the northward, except that which lies opposite the country of the Tschutskis." [The country of the Tschutskis here mentioned is the western side of Behring Straits.]

Captain Cook's view of the extent of the Russian sovereignty on the American coast is

likewise shown by his action in taking possession for Great Britain at certain places along that coast. His instructions contained the following clause:—

Cook's Voyage, vol. i, p. xxxiv.

"You are also, with the consent of the natives, to take possession, in the name of the King of Great Britain, of convenient situations in such countries as you may discover, that have not already been discovered or visited by any other European Power; and to distribute among the inhabitants such things as will remain as traces and testimonies of your having been there; but if you find the countries so discovered are uninhabited, you are to take possession of them for His Majesty, by setting up proper marks and inscriptions, as first discoverers and possessors."

Ibid., vol. ii, p. 350.
Ibid., p. 397.
Ibid., p. 433.

In pursuance of these instructions, Cook left a record of his discovery on Kaye's Island, near Prince William Sound, and landed and took formal possession of the country in Cook's Inlet and at Cape Newenham, near the mouth of the Kouskokvim River, in Bristol Bay. The last-named place is on the eastern shore of Behring Sea.

United States' Case, pp. 23, 24.
Ibid., Appendix, vol. i, p. 58.

The Pribyloff Islands themselves were not discovered until 1786 and 1787, and as late as 1821 it appears to have been unknown whether there were islands to the northward of them.

Russia's so-called settlement, Nushagak, with five Russian inhabitants.

United States' Case, p. 25.
British Case, Appendix, vol. i, p. 42.
Ibid., Appendix, vol. iii.
"United States No. 1 (1891)," p. 44.

The only Russian settlement, if such it can be called, upon the eastern shore of Behring Sea mentioned in the United States' Case, is that of Nushagak, in Bristol Bay, which appears not to have been established until 1818, and to have contained in 1819 no more that five Russian inhabitants.

Mr. Blaine himself, in a despatch to Sir J. Pauncefote, dated 17th December, 1890, says:—

"At the time these Treaties [of 1824 and 1825] were negotiated, there was only one Settlement, and that of Russians, on the shores of Behring Sea."

United States' Case, Appendix, vol. i, p. 49.
See also Appendix, vol. i, p. 11.

The inability of the Russian-American Company to maintain any effective hold upon the territory which it claimed, is freely confessed by the Minister of Finance in his letter to the Minister of Marine, dated the 9th April, 1820.

In the discussion of the Convention of 1824 which will be found in "Lyman's Diplomacy of the United States," it is explicitly stated:—

Lyman's "Diplomacy of the United States," 2nd edition, Boston, 1828, vol. ii, p. 297.

"We have said nothing of the coast to the northward of Bristol Bay, because it has never been pretended, that the Russians had any settlements on that side."

Upon the official Russian Map published in 1802, which will be found in Appendix IV to the British Case, there is a manuscript note in the following words:—

British Case, Appendix, vol. ii, Part I, p. 4.

"La Compagnie ne posséde point d'établissemens dans et au nord de la Presqu'île Alaska, quoique ses vaisseaux visitent ces régions."

No Russian settlement in or to the north of the Alaskan Peninsula.

It is also to be noted that, when the questions raised by the Russian-American Company on the Treaty of 1824 with the United States were referred to a Committee of Russian Dignitaries, this Committee on the 21st July, 1824, limited their assertion to the statement:—

Revised translation, Appendix, vol. i p. 34.

"That . . . . Russia has established permanent settlements, not only on the coast of Siberia, but also on the Aleutian group of islands."

Had there existed any settlements on the eastern coast of Behring Sea, it is obvious, from the nature of the Report, that these would have been mentioned.

The fact is, that upon the entire north-west coast of America from Behring Straits to the Alaskan Peninsula, up to 1824 practically no title by occupancy had been established at all, and any title by discovery was open to doubt and dispute.

Had any other Power taken possession of any part of the coast which Russia did not actually occupy, Russia could not have successfully asserted any claim thereto; and if other nations had pushed their trade north of, as they did up to, the Alaskan Peninsula, there was no ground on which Russia could have successfully maintained any protest. The territorial right by itself was not thought worth disputing; and

North American Review. British Case, Appendix, vol. i, p. 33.

United States' Case, p. 25.

for practical purposes the coast, as far south as Behring Bay, was then considered as worthless as a floating iceberg.

It is submitted, therefore, that there is no foundation for the assertion that—

"by first discovery, *occupation, and permanent colonization the shores and islands of Bering Sea*, the Aleutian chain, and the peninsula of Alaska became, probably as early as 1800, an undisputed part of the territory of the Russian Empire."

While no other nation drew any distinction between the title of Russia upon the American coast to the north and to the south of latitude 60°, Russia herself made no such distinction, but dealt alike with the whole north-west coast from the 55th degree to Behring Strait, up to the year 1821.

The Ukase of 1799 asserts this plainly. The following is a correct translation of the original Russian document, as given by Golovnin and Tikhménieff :—

Ukase of 1799, correctly translated.

"We, Paul I, by the Grace of God, Emperor and Autocrat of All the Russias :

[Here follows the full title of His Imperial Majesty.]

"To the Russian-American Company under our high protection :

"The profit and advantages accruing to our Empire from the industries and trade carried on by our faithful subjects in the north-eastern sea and in that part of America have attracted our attention and consideration; wherefore, taking under our immediate protection the Company which exists for the purpose of carrying on those industries and that trade, we order it to be called the Russian-American Company under our high protection, and we command our military authorities to make use of our land and sea forces, at its request, in the way best fitted to support the enterprises of the Company; and having drawn up for the Company such Rules as are best fitted to assist and encourage it, we are pleased to grant to it, by this our Imperial Charter, the following privileges for twenty years from this date :—

"1. In view of the discovery by Russian navigators in remote times of the coast of North-Eastern America* from

* The above error, in the Ukase of 1799, appears to have originated in the Agreement of 1778 between Shelikoff and Golikoff. Golovnin points out its occurrence in that Agreement, writing :—"'For north-eastern and northern America.' This mistake arose from the stupidity and ignorance of geography of some Irkutsk writer or other, who drafted the Agreement; he ought to have said : 'to the north-western shores of America.'" ("Materialui," Part I, p. 55).

55° north latitude, and of the chains of islands extending from Kamtchatka in a northerly direction to America and in a southerly direction to Japan, and on the strength of the right of dominion over them which belongs to Russia, we graciously permit the Company to enjoy *the profits of all industries and establishments* now existing on the north-eastern coast of America, from the aforesaid 55° to Behring Strait and beyond that strait, as well as on the Aleutian and Kurile Islands and the other islands situated in the north-eastern ocean.

"2. The Company may make new discoveries not only to the north of 55° north latitude, but also south of it, and may incorporate the territories it discovers into the Russian dominions under the conditions laid down in the existing Rules, if those territories have not been occupied by other nations, and have not become subject to them.

"3. The Company shall enjoy in the territory mentioned everything which it has discovered or may discover on the surface of the earth or below it, and no one shall be entitled to dispute its right to this.

"4. We graciously permit this Company in future to establish such Settlements as may be required, and to erect such fortifications as it may consider necessary for its security, and to send to those regions without any hindrance ships conveying merchandize and its employés.

"5. The Company may make voyages to all neighbouring countries, and may carry on trade with all neighbouring nations with the consent of their Governments, and after obtaining our high sanction, in order that greater power and profit may accrue to the Company from its enterprises.

"6. The Company may employ for navigation, and for its industries and establishments, persons of all classes who are free and of good reputation, and who desire to make a lawful use of such liberty; in view of the great distance of the places to which they will go, our authorities shall grant to State colonists and other free persons passports available for seven years; no serfs shall be engaged by the Company without the consent of their masters, and the Company shall pay to the Government the proper dues for all persons whom it may take into its service.

"7. Although our Imperial Decrees forbid the cutting of wood anywhere without the sanction of the College of Admiralty; nevertheless, in consideration of the distance which separates that body from the Okhotsk territory, permission is granted to the Company to cut wood, without making any payment, whenever they require it for repairing their ships or for building new ones.

"8. The Company may obtain annually from the Government artillery stores at Irkutsk from 40 to 50 poods of gunpowder, and from the Nertshinsk mines 200 poods of lead, for ready money, at the market price, for shooting game, for signals at sea, and for any unforeseen contingency on the mainland of America or on the islands.

"9. If one of the shareholders of the Company has become a debtor of the State or of private persons, and if his property, apart from his share in the Company, is not

sufficient to meet his liabilities, his capital shall be sequestrated; but as, according to the constitution of the Company, the capital cannot be withdrawn, the parties to whom it is assigned cannot realize it, but can only take the place of the debtor and obtain their proper share of the profits when a division takes place. At the expiration of the term of the privileges of the Company, their share of the capital will be paid over to them.

"10. In granting to the Company for a period of twenty years, throughout the entire extent of the lands and islands described above, *the exclusive right to all acquisitions, industries, trade, establishments, and discoveries of new countries*, we declare that these advantages and privileges shall not be enjoyed by any persons who may wish to make voyages to those regions on their own account, or by any of those who, having hitherto been engaged in this trade, and having their ships and merchandize in those regions, some even holding shares in the Company, refuse to join the latter. It is, however, open to these latter persons, if they will not join the Company in the manner prescribed by the Regulations, to continue to exercise these industries and to enjoy the advantages connected therewith under the same conditions as heretofore, *but only until the arrival of their ships in Russia*, after which date no one shall have these privileges but the Company alone, under the penalty of losing everything that is established for its benefit.

"11. All Courts shall recognize the Board of Directors of the Russian-American Company under our protection as established for the management of the affairs of the Company, and all notices issued by Courts in matters which concern the Company shall be served on that Board, and not on one of the shareholders.

"In concluding this our Imperial Charter, we order all our military and civil authorities and Courts not only not to prevent the Russian-American Company under our protection from enjoying all the privileges granted by us, but also, if necessary, to protect it from any losses or harm which may threaten it, and to aid and protect the Board of Management in every way."

Ukase says nothing of hunting grounds or hunting, and alleges no possession

It is to be observed that in the Ukase there is no reference to hunting grounds or hunting, the passages in Articles 1 and 10, in which those words appear in the translation taken from Bancroft, referring, in fact, to industries, trade, and establishments. Articles 1 and 2, as given in Bancroft, differ materially from the same Articles as given above. They allege "possession" by Russia, instead of mere "right of dominion," founded apparently on "discovery;" they omit to speak of the coast "beyond" Behring Strait; and they only faintly indicate that which is now clearly established, that the Russian Government had in view the fact that territory on the coast to the north as well as to the south of latitude 55 was still unincorporated in Russian dominions, and

See *ante*, p. 7.

might even have "become subject" to other Powers. Article 10, as now translated, allows traders to exercise their industries as before, "but only until the arrival of their ships in Russia;" which words, omitted in Bancroft, show that Russian competition only was in view.

Russian competition only was excluded by Ukase.

It will be noted that this Ukase dealt impartially with the Russian Settlements on the whole of the coast described, without distinction as to latitude; and in the absence of any distinction between the northern and the southern portions of the coast affected by that document, the facts stated in Chapter I of the British Case have equal weight in the consideration of the existence and extent of Russian jurisdiction over any and every part of the coast so claimed, and are sufficient to demonstrate that foreigners were allowed to trade there freely without molestation or interference.

Foreigners allowed to trade freely over whole coast from latitude 55 north-ward.

In the discussion on the Ukase of 1821, which took place between Count Nesselrode, Count Lieven, and the Duke of Wellington while they were attending the Congress of Verona, Count Nesselrode gave to the Duke of Wellington, a Memorandum, under date the 11th (23rd) November, 1822, in which, as already stated at p. 43 of the British Case, the following passage occurs :—

"Les mesures de précaution et de surveillance qui seront prises alors sur la partie Russe de la côte d'Amérique se trouveront entièrement conformes aux droits dérivant de sa souveraineté, ainsi qu'aux usages établis entre nations."

British Case, Appendix, vol. ii, Part I, p. 25.

To this Memorandum the Duke, in a note to Count Lieven, dated the 28th November, 1822, promptly objected :—

"*Verona, November* 28, 1822.

"M. le Comte,

"Having considered the paper which your Excellency gave me last night on the part of his Excellency Count Nesselrode on the subject of our discussions on the Russian Ukase, I must inform you that I cannot consent, on the part of my Government, to found on that paper the negotiations for the settlement of the question which has arisen between the two Governments on this subject.

British Case, Appendix, vol. ii, Part I, p. 25.

"We object to the Ukase on the grounds :—

"1. That His Imperial Majesty assumes thereby an exclusive sovereignty in North America of which we are not prepared to acknowledge the existence or the extent. Upon this point, however, the Memorandum of Count Nesselrode does afford the means of negotiation, and my Government will be ready to discuss it either in London or St. Petersburgh whenever the state of the discussions

Great Britain will not acknowledge existence or extent of Russia's exclusive sovereignty in North America.

on the other question arising out of the Ukase will allow of the discussion.

Exclusion of vessels of other nations from open sea, objected to.

"2. The second ground on which we object to the Ukase is that His Imperial Majesty thereby excludes from a certain considerable extent of the open sea vessels of other nations.

British Case, Appendix, vol. ii, Part I, p. 25.

"We contend that the assumption of this power is contrary to the law of nations, and we cannot found a negotiation upon a paper in which it is again broadly asserted. We contend that no Power whatever can exclude another from the use of the open sea. A Power can exclude itself from the navigation of a certain coast, sea, &c., by its own act or engagement, but it cannot by right be excluded by another. This we consider as the law of nations, and we cannot negotiate upon a paper in which a right is asserted inconsistent with this principle.

"I think, therefore, that the best mode of proceeding would be that you should state your readiness to negotiate upon the whole subject, without restating the objectionable principle of the Ukase, which we cannot admit.

"Ever yours, &c.

(Signed) "WELLINGTON."

Finally, on the 29th November, 1822, the Duke reports to Mr. G. Canning, British Secretary of State for Foreign Affairs, that the Memorandum of the 11th (23rd November) is withdrawn, and that the Emperor of Russia is ready to negotiate upon—

Ibid., p. 26.

"the whole question of the Emperor's claims in North America, reserving them all if the result of the negotiation should not be satisfactory to both parties."

See "Memoirs of John Quincy Adams," vol. vi, p. 163.

That the Government of the United States did not recognize as "undisputed" the claim of Russia to the coasts of Behring Sea, is also clear from the statement made by Mr. Adams, the United States' Secretary of State, on the 17th July, 1823, to Baron Tuyll, the Russian Minister at Washington, that—

United States contest Russia's right to *any* territorial establishment in America.

"we should contest the right of Russia to *any** territorial establishment on this continent."

British Case, p. 34.

Mr. Adams reiterates this contention in a despatch to Mr. Middleton, the United States' Minister at St. Petersburgh, dated the 22nd July, 1823, in which, referring to the Ukase of 1799, he declares that—

Ibid., Appendix, vol. ii, Part II, p. 4.

"Russia had never before *asserted** a right of sovereignty over any part of the North American Continent."

Russia's first *assertion* of sovereignty was in 1799.

In a letter of the same date, addressed to Mr. Rush, United States' Minister in London, Mr. Adams says:—

United States' State Papers, vol. v, p. 446. Appendix, vol. i, p. 56.

"It appears upon examination that these claims have no foundation in fact. *The right of discovery, on this conti-*

* The *italics* are in the original

nent, claimable by Russia, is reduced to the probability, that in 1741, *Captain Tchirikoff saw from the sea the mountain called St. Elias*, in about the 59th degree of north latitude. The Spanish navigators, as early as 1582, had discovered as far north as 57° 30′.

Her right of discovery fanciful.

* * * *

"It never has been admitted by the various European nations which have formed settlements in this hemisphere that the occupation of an island gave any claim whatever to territorial possession on the continent to which it was adjoining. The recognized principle has rather been the reverse," &c.

But whatever may have been the claims of Russia, whether admitted or not, in respect of the north-west coast of America and the islands adjacent thereto, no claim had ever been made prior to the year 1821 to exclude vessels of other nations from navigating the waters of Behring Sea, or to exercise jurisdiction over the waters of that sea as *mare clausum*, or an inland sea. On the contrary, the ground or justification for the attempted interference by Russia in the year 1821 was the competition with the Russian-American Company by the vessels and traders of other nations. This is sufficiently shown by the authorities quoted in Chapter I, Head (A), of the British Case, and by the letters Nos. 1, 2, 3, 4, and 5 in the correspondence of the Russian-American Company, which contain numerous references in the nature of complaints as to the presence of foreign competitors in trade.

No claim prior to 1821, to exclude vessels of other nations from Behring Sea.

Appendix, vol. i, pp. 11-21.
United States' Case, Appendix, vol. i, pp. 49–57.

The fifth contention at the head of this Chapter, which may be conveniently taken before the fourth, is in substance that the Ukase of 1799 called forth no protest or objection from foreign Powers. To this it may be answered, in the words of Mr. Middleton, that—

Contention that Ukase of 1799 asserted exclusive rights, and was acquiesced in by foreign Powers.

Ukase in form domestic and never notified to foreign States.

"this ukase, which is, in its *form*,* an act purely domestic, was never notified to any foreign State with injunction to respect its provisions."

Mr. Middleton to Mr. Adams, American State Papers, Foreign Relations, vol. v, p. 461.

In point of fact, Her Majesty's Government have been unable to discover that the Ukase of 1799 was communicated to any foreign Government in any form whatsoever.

Moreover, as appears from the provisions of the Ukase itself, it dealt only, as was pointed out by Mr. Middleton and by Mr. Adams, with the rights of the Russian-American Company,

Ante, pp. 11-13.
British Case, pp. 29-34.

* The *italics* are in the original.

to the exclusion of other Russian subjects: a fact which the correct translation of the Ukase brings out more clearly.

United States' Case, Appendix, vol. i, pp. 14, 21, and 28.

In support of the view that the Charters to the Russian-American Company were not and did not purport to be international documents, but purely domestic acts, not intended to affect foreign nations, reference may be made to the terms of the documents themselves and to those of the Ukases commented upon hereafter at p. 61 *et seq.* In each case, with the single exception of the Charter based directly upon the Ukase of 1821, their terms are strictly limited to the exclusion of Russian subjects only.

No Charter of Russian-American Company, except that of 1821, purports to affect foreigners.

United States' Case, vol. i, p. 24.

British Case, pp. 23, 24.

The object of the Charters was not in any way to control foreigners; but, in the first instance, to consolidate the numerous rival Russian Companies which were competing with each other, and by their competition giving rise to gross abuses; and subsequently to protect the Consolidated Company.

Ibid., p. 28.

It is again to be noted, that the *exclusive* rights specially granted to the Russian-American Company by the Ukase of 1799 were rights to be exercised on land already acquired or thereafter to be discovered within the prescribed area, and not over non-territorial *waters* of Behring Sea or any other non-territorial waters.

Contention that, under Ukase of 1799, foreign vessels were not allowed to visit Behring Sea.

It is now necessary to deal with the contentions:

(4.) That, under the Ukase of 1799, the Russian-American Company, acting under the sanction of the Russian Government, did not permit foreign vessels to visit Behring Sea; and

(6.) That, up to the date of the Treaties of 1824 and 1825, Russia did assert and exercise exclusive rights of commerce, hunting, and fishing in all the waters of Behring Sea.

British Case, p. 32. Golovnin, "Materaluí," Part I. Table of Contents.

Neither of these allegations is supported by the facts. The domestic character of the Ukase itself has been already shown; and the report of Golovnin, written in 1818 as to the "Company's colonies," speaks of the importance of presenting a better appearance to "foreigners visiting these parts." No instance is to be found of Russia preventing foreign vessels from visiting Behring Sea; and it must be remembered that the Ukase of 1799 applied equally to the whole coast of America from Behring Straits to

No instance of exclusion.

latitude 55°. There were at all times foreign vessels trading to places north of latitude 55°, where the Ukase was intended to have the same operation as in Behring Sea itself.

On the other hand, the solitary instance in which it is alleged on the part of the United States that Russia actually asserted exclusive rights over Behring Sea prior to 1821, is the case of the Riccord-Pigott contract in 1819. Three letters (dated 10th April, 1820, 23rd April, 1820, and 31st March, 1821) are relied upon as—

"illustrating the complete control which Russia claimed and actually exercised over Behring Sea prior to 1821."

Disallowance of Riccord-Pigott contract involved no maritime jurisdiction.

United States' Case, p. 45.

Appendix, vol. i, pp. 13, 16, and 18.

United States' Case, p. 45.

From the facts alluded to in these letters, it appears that Riccord, the Superintendent of Kamtchatka, had made an agreement with Pigott, an Englishman, for ten years, from 1819—

"with reference to fishing for whales and extracting oil from these and other marine animals on the shores of Kamtchatka and on those of all Eastern Siberia, in the harbours and bays and amongst the islands."

Letter, April 23, 1820.

Revised translation, Appendix, vol. i, p. 17.

This contract was undoubtedly disapproved by the Russian Government, which, having granted to a Russian Company a monopoly of trade in these regions, to the exclusion of all other Russian subjects, was naturally unwilling to allow any part of this monopoly to be enjoyed by foreigners. The Russian-American Company was therefore instructed to turn its attention to the whale fishery, and to employ a ship in fishing, the reason given being, as appears from the following quotation, that—

"the whale-fishing industry may be of use as a means of assisting the inhabitants of Kamtchatka and Okhotsk when the other fisheries fail."

Letter, April 10, 1820, paragraph 1.

Revised translation, Appendix, vol. i, p. 13.

The Government further ordered that no foreigner should be allowed to enter a merchant guild or to settle at Kamtchatka or Okhotsk, and that no foreign merchant-vessel should be permitted—

"to trade at those places under any circumstances, or to enter the ports of Eastern Siberia except in case of distress. . . . . Furthermore, the Englishman Davis at Okhotsk, and Dobello's agent in Kamtchatka are to be informed . . . . that the Government refuses them permission to remain at those places, or to build houses or hold real property there; the local authorities shall afford them all proper facilities for disposal of their property and leaving the country."

Ibid., paragraph 2.

Revised translation, Appendix, vol i, p. 14.

These instructions have been quoted because they show clearly that the Russian Govern-

ment exercised in this instance no jurisdiction other than the ordinary territorial jurisdiction which attaches to every nation in right of its possession of the soil, and that they made no attempt to exclude foreign vessels from navigating the ocean.

The rest of the correspondence concerning this matter has, since the presentation of the United States' Case been produced by the United States, in reply to a notice by the British Agent under Article IV of the Treaty of the 20th February, 1892. It is given in the Appendix to this Counter-Case, and it is submitted that it clearly proves that Pigott frequented the Behring Sea from 1819 to 1822, and was not merely an accidental visitor to Kamtchatka in 1819. He was one of many traders who had visited places on both shores of the Behring Sea, and he had pushed his trading on the American coast as far as Kotzebue Sound, north of Behring Straits. The following are extracts from the correspondence.

Appendix, vol. i, pp. 60–63.

In a Report to the Russian-American Company dated, apparently from Sitka, January 1821, it is stated :—

Ibid., pp. 62, 63.

"On the 29th September [1820] the American brig 'Pedlar' arrived at this port. Her captain is Meek, a brother of Meek who is well known to you. She had on board Mr. Pigott, with whom you are well acquainted. He was the supercargo or owner; for the cargo was under his control, and he directed the movements of the ship. He had come from Kamtchatka in eighteen days.

* * * *

"There were at that time two men-of-war on the roadstead, and this fact afforded me frequent opportunities of meeting Pigott, for he was acquainted with the officers of both of them. *They had met beyond Behring Straits in Kotzebue Sound*, and had been anchored there together. He said, in a hesitating way, that *he had been trading there.*

* * * *

"I must confess that *I was wrong when I said*, in a letter to Michael Michailovitch, *that a single man-of-war would be sufficient to put an end to this traffic.* To tell the truth, I did not believe it at the time; but I was afraid that a whole squadron, or at least a couple of frigates, would come down upon us. This prospect frightened me, both as Manager of the American Colonies and as a Russian. They would have eaten up all our provisions, and cost the Emperor a lot of money, without doing much good.

* * * *

"What hope is there that a single frigate will be able to stop this traffic on our shores, abounding in straits and excellent harbours, *and so well known to these Americans that they may be called the pilots of these coasts?* They will always be on good terms with the natives. . . . ."

On the 1st February, 1820, the Governor-

General of Siberia wrote to Count Nesselrode, Secretary of State, a letter containing the following passages :—

Barter by United States' citizens at Russian establishments.

Appendix, vol. i, p. 60.

"(1.) *We are familiar with the complaints made by the American Company in regard to the bartering carried on by citizens* of the United States at their establishments, and in regard to their supplying the natives with fire-arms. *These complaints are well founded, but nothing can be done in the matter.* It would be useless to apply to the United States' Government to stop the trading; the commercial rules of the United States do not allow such interference on the part of their Government. *The only thing to be done is* for the Company to endeavour to strengthen the defences of the principal places in the Colonies, and for the Government, at least, *not to favour this foreign trade.* But the establishment of a whale fishery on the eastern shores of Siberia would undoubtedly favour it in a high degree. The establishment of a whale fishery would be a pretext for, and an encouragement to, foreign trade.

"(2.) Although the fur industry in Kamtchatka and Okhotsk, which has been declining from various causes, has now become unimportant, nevertheless, the present trade and its prospects for the future are in the hands of Russian traders. If an industry in the hands of foreigners is established on the coast, the whole trade will certainly pass into foreign hands. In this thinly-populated region it is impossible to establish an effective supervision; moreover, *how is the importation of brandy, rum, &c., to be prevented?*

* * * *

Russia does not prevent foreigners from whaling.

"(4.) *M. Ricord says,* in his letter, *that, owing to the smallness of our forces* in that part of the world, *we cannot prevent foreigners from whaling.* In the first place, we may not be so weak as he supposes. The occasional appearance of a single properly armed ship may be sufficient to keep quiet and disperse all these whalers. In the second place, if they are able to get possession of this industry by force, why should this force be sanctioned by a formal Agreement?"

The following extract from a letter from the Board of Management of the Russian-American Company to Captain Muravieff, Chief Manager of the Russian-American Colonies, concerning Pigott, is also interesting :—

"(No. 149.) "*February* 28, 1822.

Ibid., p. 62.

"*The Board were aware that Captain Pigott, who was at Kamtchatka, intended to sail thence to our Colonies,* and your despatch No. 8 of the 18th January, 1821, confirmed them in their belief that he proposed to visit waters belonging to Russia. He has paid you a visit, as you report, under stress of weather, and you have done right in assisting him; but he would never have come to Novo-Arkhangelsk if he had not been forced to put into that port; *what he meant to do was to collect furs secretly at other places. It was with this object, and in order to get a*

footing for this purpose on the Aleutian Islands, or on the northern islands situated in the direction of Behring Strait, that he made his proposal, of which you have already been informed, with regard to whaling and fishing for the benefit of Kamtchatka and Okhotsk; in the meantime, he has been asking permission from Dobello, M. Ricord's friend, to trade with the Tshuktshes [on the northern Asiatic coast], and to use the Russian flag while so engaged."

The only evidence offered of Russian jurisdiction over waters consists in translator's interpolations.

Several passages are quoted from the correspondence of the Russian-American Company in the Case presented on behalf of the United States, as proving the assertion by Russia of jurisdiction over waters; but it will be found that the alleged proof is supported only by passages which are not contained in the original documents, and have been interpolated.

United States' Case, pp. 43, 44.

The quotations are set out below, the interpolated passages being printed in small capitals and underlined and inclosed in brackets.

Thus at pp. 43 and 44, the United States rely on the following extracts from a letter dated the 9th April, 1820, from the Russian Minister of Finance to the Russian Minister of Marine:—

(For revised translation, see Appendix, vol. i, p. 11.)

"It appears of the most imperative necessity for the preservation of our sovereignty in the north-western part of America [AND ON THE ISLANDS AND WATERS SITUATED BETWEEN THEM], to maintain there continuously two ships of the Imperial fleet."*

After suggesting that two vessels should be dispatched during that year, one to cruize from Sitka westward and northward, the letter as quoted purports to continue:—

(For revised translation, see Appendix, vol. i, p. 12.)

"The commander . . . . having thoroughly examined the shores of the Aleutian Islands, the coast of Kamchatka, the Kurile Islands [AND THE INTERVENING WATERS], he may return for the winter to the harbour of Petropavlovsk. The other ship, however (sailing from Petropavlovsk), having examined the eastern coast of the Kamchatka Peninsula up to 62° of northern latitude, and the west coast of America from this latitude to the Island of Unalaska, [AND THE INTERVENING WATERS (BERING SEA)], should proceed to Kadiak, and from there to Sitka for the winter. The object of the cruizing of two of our armed vessels in the localities above mentioned is the protection of our Colonies [AND THE EXCLUSION OF FOREIGN VESSELS ENGAGED IN TRAFFIC OR INDUSTRY INJURIOUS TO THE INTERESTS OF THE RUSSIAN COMPANY, AS WELL AS TO THOSE OF THE NATIVE INHABITANTS OF THOSE REGIONS]."

* This type, inclosed in brackets, always denotes an interpolation of the kind mentioned in the Introduction. A reference to the interpolations would now be immaterial, were it not that it is necessary to show to how large an extent the case of the United States rests upon them.

At p. 46 the following quotation is given from a letter, dated the 10th April, 1820, addressed by the Minister of Finance to the Board of Administration of the Russian-American Company :—

"Having for the benefit of the American Company excluded all foreigners from Kamtchatka and Okhotsk, and prohibited them from engaging in trade [AND FROM HUNTING AND FISHING IN ALL THE WATERS OF EASTERN SIBERIA], the Government fully expects that the Company, on its part, will hold itself responsible for supplying those regions with all necessaries. . . . .

United States' Case, p. 46. (For revised translation, see Appendix, vol. i, p. 15.)

["IN CONCLUSION, IT IS STATED AS THE DECISION OF HIS MAJESTY THE EMPEROR, IN VIEW OF POSSIBLE FUTURE COMPLICATIONS OF THIS NATURE, THAT NO CONTRACTS INVOLVING THE FREE ADMISSION OR NAVIGATION FOR TRADE OF FOREIGN SHIPS OR FOREIGN SUBJECTS IN THE WATERS ADJOINING OR BOUNDED BY THE COASTS OF RUSSIAN COLONIES WILL BE APPROVED BY THE IMPERIAL GOVERNMENT."]

Ibid., p. 47.

Further, at p. 47, there is a quotation from a letter addressed by the Board to the Chief Manager of the Colonies at Sitka, dated the 23rd April, 1820 :—

Ibid. (For revised translation, see Appendix, vol. i, pp. 17, 18.)

". . . . Basing your own action upon this proceeding of our Highest Protector, you, as Commander of all our Colonies must prohibit with equal strictness all foreigners from engaging in any intercourse or trade with native inhabitants, [AS WELL AS FROM VISITING THE WATERS FREQUENTED BY SEA-OTTERS AND FUR-SEALS, OVER WHICH OUR OPERATIONS EXTEND], under penalty of the most severe measures, including the confiscation of ships and the imprisonment of crews engaged in this illegal traffic. You must act with the greatest severity in cases where foreigners have sold to the natives arms, powder, and lead. [THEY MUST BE MADE TO UNDERSTAND THAT THEIR PRESENCE IN OUR WATERS IS CONTRARY TO OUR LAWS, AND THAT] they will never be admitted to any port unless you or your subordinates convince yourselves that such is necessary for the saving of life. In a word, you must preserve an attitude in full accord with the views of the Imperial Government on this subject [AND PROTECT AGAINST ALL INTRUDERS THE DOMAIN OF LAND AND WATER GRANTED TO US BY THE GRACE OF THE EMPEROR AND NECESSARY FOR OUR CONTINUED EXISTENCE AND PROSPERITY]. You must transmit these instructions without delay to your subordinate Commanders for their conduct in their intercourse with foreigners, and especially to the Commanders of ships navigating our waters, [TO ENABLE THEM TO DRIVE AWAY THE FOREIGN INTRUDERS]."

Ibid., p. 48.

And at pp. 49, 41, and 42 from three others, dated the 31st March, 1821, the 20th September,

1821, and the 28th February, 1822, respectively:—

United States' Case, p. 49. (For revised translation, see Appendix, vol. i, p. 19.)

". . . . The principles involved in this action of the Government you must also observe in dealing with foreigners who may visit our Colonies, [USING ALL THE FORCE AT YOUR COMMAND TO DRIVE THEM FROM OUR WATERS.] . . . ."

Ibid., p. 41. (For revised translation, see Appendix, vol. i, p. 23.)

[" WITH THIS PRECIOUS ACT IN YOUR HAND YOU WILL BE ENABLED TO ASSUME A NEW POSITION, AND TO STAND FIRMLY OPPOSED TO ALL ATTEMPTS ON THE PART OF FOREIGNERS TO INFRINGE UPON OUR RIGHTS AND PRIVILEGES. IN ACCORDANCE WITH THE WILL OF HIS IMPERIAL MAJESTY, WE WILL NOT BE LEFT TO PROTECT UNAIDED THE LAND AND WATERS EMBRACED IN OUR EXCLUSIVE PRIVILEGES. A SQUADRON OF NAVAL VESSELS IS UNDER ORDERS TO PREPARE FOR A CRUIZE TO THE COASTS OF NORTH-EASTERN ASIA AND NORTH-WESTERN AMERICA

* * * *

WE CAN NOW STAND UPON OUR RIGHTS, AND DRIVE FROM OUR WATERS AND PORTS THE INTRUDERS WHO THREATEN TO NEUTRALIZE THE BENEFITS AND GIFTS MOST GRACIOUSLY BESTOWED UPON OUR COMPANY BY HIS IMPERIAL MAJESTY.]"

Ibid., p. 42. (For revised translation, see Appendix, vol. i, p. 24.)

[" AS TO FUR-SEALS, HOWEVER, SINCE OUR GRACIOUS SOVEREIGN HAS BEEN PLEASED TO STRENGTHEN OUR CLAIMS OF JURISDICTION AND EXCLUSIVE RIGHTS IN THESE WATERS WITH HIS STRONG HAND, WE CAN WELL AFFORD TO REDUCE THE NUMBER OF SEALS KILLED ANNUALLY, AND TO PATIENTLY AWAIT THE NATURAL INCREASE RESULTING THEREFROM, WHICH WILL YIELD US AN ABUNDANT HARVEST IN THE FUTURE]."

A letter from the Board to the Chief Manager, dated the 3rd August, 1820, is not cited in the United States' Case, but appears in the Appendix thereto; it contains the following:—

Appendix, vol. i, p. 57. (For revised translation, see Appendix, vol. i, p. 20.)

"You will perceive . . . that we . . . do not countenance any intercourse with foreigners, [OR THE ADMISSION OF FOREIGNERS WITHIN THE PRECINCTS OF OUR POSSESSIONS, except in case of absolute necessity. Heretofore, all such transactions have generally resulted in serious losses to us. [AND THE VERY PRESENCE OF FOREIGNERS IN OUR WATERS HAS BECOME A VITAL QUESTION, AFFECTING THE EXISTENCE OF THE COMPANY.]"

The inclosure to this last-quoted letter consists of "orders from the Russian-American Company to its Kadiak office, 3rd August, 1820."

This inclosure also is not cited in the United States' Case, but is given in the Appendix, and includes the following :—

"The deceased Baranof was frequently instructed to abstain as far as possible from all intercourse with the foreigners visiting our Colonies. . . . . [FOR THE SAKE OF PRESERVING INTACT OUR VALUABLE PRIVILEGES IN THE WATERS OVER WHICH OUR TRADE AND INDUSTRY EXTENDS], we may well dispense with such articles of luxury as the foreigners endeavour to make us purchase from them."

United States' Case, Appendix, vol. 1, p. 57. (For revised translation, see Appendix, vol. i, p. 20.)

It is important to bear in mind that the passages above included in brackets have nothing corresponding to them in the original documents. The original documents, when read without the interpolated passages, far from constituting any proof that the Russian Government were asserting any dominion over Behring Sea, disprove that allegation, and show clearly that all they desired or contemplated was to protect the trading on the coast.

When the position of the persons by whom these letters were written, and to whom they were addressed, is remembered, it becomes clear not only that foreigners frequented Behring Sea in considerable numbers, but also that Russia and the Russian-American Company recognized that their presence there was unavoidable, and that interference with them must be strictly limited to the ordinary territorial jurisdiction.

Foreigners frequented Behring Sea in numbers.

Neither is any trace to be found of any action having been taken under the instructions issued by the Board of the Company with the view to excluding foreigners from trading in Behring Sea.

It is submitted that the propositions that were formulated on p. 36 of the British Case with reference to the user of the waters of Behring Sea up to the year 1821, and supported by the evidence cited therein, have not been displaced by any facts or arguments produced in the Case of the United States; but, on the contrary, that the further examination of the subject establishes that, down to the year 1821, Russia neither asserted nor exercised in the non-territorial waters of the North Pacific, including the body of water now known as Behring Sea, any rights to the exclusion of other nations.

Before 1821, Russia asserted no exclusive jurisdiction in Behring Sea.

CHAPTER II.

HEAD (B).—*The Ukase of* 1821, *and the circumstances connected therewith leading up to the Treaties of* 1824 *and* 1825.

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 49—

"It thus appears from the foregoing citations that, so far as it concerned the coasts and waters of Bering Sea, the Ukase of 1821 was merely declaratory of pre-existing claims of exclusive jurisdiction as to trade, which had been enforced therein for many years."

(2.) United States' Case, p. 50—

"It was only when the Ukase of 1821 sought to extend the Russian claim to the American Continent south to latitude 51°, and to place the coasts and waters of the ocean in that region under the exclusive control of the Russian-American Company, that vigorous protests were made by the Governments of the United States and Great Britain. And the correspondence which grew out of those protests shows that they were inspired by the claim of jurisdiction over large portions of the Pacific Ocean (as distinguished from Bering Sea), and by the conflicting claims of the three nations to the coast over which Russia sought to extend exclusive authority."

(3.) United States' Case, p. 56—

"Neither in the protests, negotiations, nor treaties is any reference found to Bering Sea."

SUMMARY OF BRITISH REPLY.

The citations referred to in Contention (1.) when freed from interpolations, show no claims of exclusive jurisdiction over the coasts and waters of Behring Sea.

Throughout the protests and negotiations resulting in the Treaties of 1824 and 1825, there was only one sea area under discussion, namely, that defined in the Ukase of 1821. The absence of all reference to Behring Sea by a distinctive name, proves that it was not, for any purpose, separated from the rest of the defined area.

The term "Pacific Ocean" was used throughout the protests and negotiations to include Behring Sea; and the term "north-west coast" to include the whole west coast of America from Behring Strait to 51 north latitude.

The claim of Russia to maritime jurisdiction was that against which the protests of Great Britain and the United States were most vigorous, and the first place in each Treaty was assigned to the clause by which it was given up.

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Contention that the Ukase of 1821 was as to Behring Sea, merely declaratory of pre-existing claims of exclusive jurisdiction.

The "foregoing citations" mentioned in the first of the above contentions as showing that, so far as it concerned the coasts and waters of Behring Sea, the Ukase of 1821 was merely declaratory of pre-existing claims, are dealt with in the latter part of the preceding chapter. They are the letters dated respectively the 9th, 10th, and 23rd April, 1820; 31st March and 20th September, 1821; and 28th February, 1822. The original documents, as will be found from the correct translations, afford no ground whatever for this contention.

Appendix, vol. i, pp. 11, 13, 16, 18, 23, and 24.

The presence of foreigners in the Russian possessions has already been alluded to as the chief motive and justification for the Ukase, and it has been shown that it was doubtless in consequence of the complaints made on that score, that the Ukase purported to exclude foreigners from approaching within 100 miles of the whole of the north-west coast of America, beginning from Behring Straits, to the 51st degree of northern latitude.

British Case, p. 39.
United States' Case, Appendix, vol. i, p. 16.

No valid ground for the distinction suggested between the coasts and waters of Behring Sea and those of other seas can be found in the Ukase itself, which, like the Ukase of 1799, asserts a claim to the whole of the coast-line specified, and regards the whole as subject to the same jurisdiction.

United States' Case, pp. 41–49.

Ukase does not distinguish between Behring Sea and waters outside.

The following are the words of the Ukase—

"The pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports, and gulfs, including the whole of the *north-west coast of America, beginning from Behring's Straits* to the 51st degree of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South Cape of the Island of Urup, viz., to the 45° 50′ northern latitude, is exclusively granted to Russian subjects."

It applies to north-west coast from Behring Straits to latitude 51° north.

The letter from Baron Nicolay to the Marquis of Londonderry, dated the 31st October, 1821, by which this Ukase was officially notified to the British Government, speaks of the sea lying between the coasts thus defined as—

British Case. Appendix, vol. ii, Part I, p. 2.

Sea area defined in Ukase, described as part of Pacific Ocean.

"cette partie de l'Océan Pacifique que bordent nos possessions en Amérique et en Asie."

And he concludes his letter by saying:—

"Les officiers commandant les bâtiments de guerre Russes qui sont destinés à veiller dans l'Océan Pacifique

au maintien des dispositions susmentionnées, ont reçu l'ordre de commencer à les mettre en vigueur envers ceux des navires étrangers qui seroient sortis d'un des ports de l'Europe après le 1er Mars, 1822, ou des États-Unis après le 1er Juillet. A dater de ces époques aucun navire ne pourra plus légalement prétexter l'ignorance du nouveau Règlement."

British Case, pp. 59-76.

It is difficult to understand the ground for the allegation that neither in the protests, negotiations, nor Treaties, is any reference found to Behring Sea. The fact that, during the whole of the negotiations prior to 1824 and 1825, no reference is made by any distinctive name to Behring Sea, strongly supports the contention of Her Majesty's Government. The reason is obvious. The whole area affected by the Ukase was the subject of discussion, and no distinction was drawn between the part of the Pacific Ocean north and that south of the Aleutian Islands. Had any such distinction been intended, it must have been repeatedly mentioned; and had it been desired to deal with the waters of Behring Sea in an exceptional manner, an express provision to that end must have been inserted.

Throughout negotiations, no mention of Behring Sea by distinctive name.

British Case, Appendix, vol. ii, Parts I and II.

With reference to this point, attention is invited to Chapter II of the British Case, and the correspondence set out in the Appendix thereto.

The Ukase of the 4th September, 1821, which led to the protests, negotiations, and Treaties, claimed the exclusive right to the pursuits of commerce, whaling, and fishing on all islands, ports, and gulfs, including the whole of the north-west coast of America from Behring Strait to the 51st degree of the northern latitude and the Aleutian Islands.

Ibid., Part II, p. 3.

M. de Poletica, in his letter to Mr. Adams of the 28th February, 1822, claims

Pacific Ocean extends on north-west coast from Behring Strait to latitude 51° north.

British Case, pp. 48, 49.
United States' Case, Appendix, vol. i, p. 133.

"that the Russian possessions on the Pacific Ocean extend on the north-west coast of America from Behring Strait to the 51st degree of north latitude, and on the opposite side of Asia and the islands adjacent from the same Strait to the 45th degree. The extent of sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to *shut seas* ('mers fermées'), and the Russian Government might consequently judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, without taking any advantage of localities."

The extent of waters thus limited he claims as "shut seas ('mers fermées')." The same limits are either expressly or impliedly referred to throughout the correspondence.*

Thus in the letter from Mr. Adams to Mr. Middleton of the 22nd July, 1823, the writer states that—

"the pretensions of the Imperial Government extend to an exclusive territorial jurisdiction *from the 45th degree of north latitude, on the Asiatic coast, to the latitude of 51° north on the western coast of the American Continent;* and they assume the right of interdicting the *navigation* and the fishery of all other nations to the extent of 100 miles from the *whole of that coast. The United States can admit no part of these claims.* Their right of navigating and of fishing is perfect, and has been in constant exercise from the earliest times, after the Peace of 1783, throughout the whole of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions, which, so far as Russian rights are concerned, are confined to certain *islands*† north of the 55th degree of latitude, and have no existence on the Continent of America."

British Case, Appendix, vol. ii, Part II, p. 4.

United States admit no part of Russian claims.

Mr. Middleton's opinion upon the subject of the Ukase, with its claim to close even Behring Strait, clearly appears in his Memorial of the

British Case, p. 50–61.

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* See particularly in the correspondence between Russia and the United States:—

M. de Poletica to Mr. Adams, 2nd April, 1822. — United States' Case, Appendix, vol. i, p. 135.

Mr. Adams to Mr. Middleton, 22nd July, 1823. — British Case, Appendix, vol. ii, Part II, p. 4.

Mr. Adams to Mr. Rush, 22nd July, 1823. — Ibid., p. 6

Memorial by Mr. Middleton, 1st December, 1823. — Ibid., p. 7.

In the correspondence between Great Britain and Russia:—

Baron Nicolay to the Marquis of Londonderry, 31st October, 1821. — Ibid., Appendix, vol. ii, Part I, p. 1.

Count Nesselrode to Count Lieven, 7th October, 1821. — Ibid., p. 3.

Messrs. F. Enderby and Mellish to Board of Trade, 27th November, 1821. — Ibid., p. 13.

Mr. G. Canning to the Duke of Wellington, 27th September, 1822. — Ibid., p. 21.

Ship-owners' Society to Mr. G. Canning, 11th June, 1823. — Ibid., p. 36.

Mr. Enderby to the Board of Trade, 7th February, 1824. — Ibid., p. 52.

And in the correspondence of the Russian - American Company:—

Minister of Finance to Russian-American Company, 18th July, 1822. — United States Case, Appendix, vol. i, p. 62.

Count Nesselrode to N. S. Mordvinof, 11th April, 1824. — Ibid., p. 14.

† This word is in *italics* in the original

1st (13th) December, 1823, which contains the following passage:—

United States object to shutting up of a Strait never before shut up.

British Case, Appendix, vol. ii, Part II, p. 7.

"The Ukase even goes to the *shutting up of a strait which has never been till now shut up*, and which is at the present the principal object of discoveries interesting and useful to the sciences. . . . . The extension of territorial rights to the distance of 100 *miles from the coasts* upon *two opposite continents*, and the prohibition of approaching to the same distance from these coasts, or from those of all the intervening islands, are innovations in the law of nations and measures unexampled."

Ibid., Part I, p. 61.

Mr. G. Canning, writing to Sir C. Bagot, Her Majesty's Ambassador at St. Petersburgh, on the 12th July, 1824, inclosed the draft of a "Projet" of Convention, which Sir C. Bagot was authorized to sign.

British 'Projet.'

This "Projet" contained the following:—

"His Majesty the King of the United Kingdom of Great Britain and Ireland, and His Majesty the Emperor of All the Russias, being desirous of drawing still closer the ties of friendship and good understanding which unite them, by means of an Agreement which shall settle, upon the basis of reciprocal convenience, the different points connected with the commerce, navigation, and fisheries of their subjects on the Pacific Ocean, as well as the limits of their possessions and establishments on the north-west coast of America; their said Majesties have named their Plenipotentiaries to conclude a Convention for this purpose, that is to say:

"His Majesty the King of the United Kingdom of Great Britain and Ireland, &c., &c., &c.;

"And His Majesty the Emperor of All the Russias, &c., &c., &c.;

"Who, after having communicated to each other their respective full powers, found to be in due and proper form, have agreed upon and concluded the following Articles:—

"ARTICLE I.

"Pacific Ocean comprehending the sea within Behring Straits."

"It is agreed between the High Contracting Parties that their respective subjects shall enjoy the right of free navigation along the *whole extent of the Pacific Ocean, comprehending the sea within Behring's Straits*, and shall neither be troubled nor molested in carrying on their trade and fisheries, in all parts of the said ocean, either to the northward or southward thereof.

"It being well understood that the said right of fishery shall not be exercised by the subjects of either of the two Powers, nearer than 2 marine leagues from the respective possessions of the other.

"ARTICLE II.

"The line which separates the possessions of the two High Contracting Parties upon the continent and the Islands of America to the north-west, shall be drawn in the manner following:—

"Commencing from the two points of the island called 'Prince of Wales' Island,' which form the southern extremity thereof, which points lie in the parallel of 54° 40′, and between the 131st and 133rd degree of west longitude (meridian of Greenwich), the line of frontier between the British and Russian possessions shall ascend northerly along the channel called Portland Channel, till it strikes the coast of the continent lying in the 56th degree of north latitude. From this point it shall be carried along that coast, in a direction parallel to its windings, and at or within the seaward base of the mountains by which it is bounded, as far as the 139th degree of longitude west of the said meridian. Thence the said meridian line of 139th degree of west longitude, in its extension as far as the Frozen Ocean, shall form the boundary of the British and Russian possessions on the said Continent of America to the north-west.

"ARTICLE III.

"It is, nevertheless, understood, with regard to the stipulations of the preceding Article:—

"1. That the said line of coast on the Continent of America, which forms the boundary of the Russian possessions, shall not, in any case, extend more than marine leagues in breadth from the sea towards the interior, at whatever distance the aforesaid mountains may be.

"2. That British subjects shall for ever freely navigate and trade along the said line of coast, and along the neighbouring islands.

"3. That the navigation and commerce of those rivers of the continent which cross this line of coast shall be open to British subjects, as well as those inhabiting or visiting the interior of this continent, as to those coming from the Pacific Ocean, who shall touch at these latitudes.

"ARTICLE IV.

"The port of Sitka or Nove Archangelsk shall be, and shall for ever remain, open to the commerce of the subjects of His Britannic Majesty.

"ARTICLE V.

"With regard to the *other parts of the north-west coast of America*, and of the islands adjacent thereto, belonging to either of the two High Contracting Parties, it is agreed that, for the space of years from the April, 1824

their respective vessels, and those of their subjects, shall reciprocally enjoy the liberty of visiting, without hindrance, the gulfs, havens, and creeks of the said coast, in places not already occupied, for the purposes of fishery and of commerce with the natives of the country.

"It being understood:—

"1. That the subjects of either of the High Contracting Parties shall not land at any spot where there may be an establishment of the other, without the permission of the Governor or other authority of the place, unless they should be driven thither by stress of weather or other accidents.

"2. That the said liberty of commerce shall not include the trade in spirituous liquors, in fire-arms, swords, bayonets, &c., gunpowder, or other warlike stores. The High Contracting Parties reciprocally engaging not to permit the above-mentioned articles to be sold or transferred, in any manner whatever, to the natives of the country."

It will be observed that, in this first draft Convention, Article I purported to give to the subjects of each Power—

"the right of free navigation along the whole extent of the Pacific Ocean, comprehending the sea within Behring Straits."

British Case, Appendix, vol. ii, Part I, p. 66.

It was suggested by Count Lieven, in a Memorandum communicated to Mr. G. Canning in July 1824, that the Imperial Government might hesitate to admit this condition—

"sans en modifier l'énoncé actuel pour ne point exposer les côtes de *ses possessions Asiatiques* dans la *Mer Glaciale* aux inconvéniens qui pourraient naître de la visite des bâtimens étrangers."

British Case, p. 16.

The objection, therefore, related wholly to Behring Strait and the Russian Asiatic possessions beyond them, and not to Behring Sea.

With reference to Count Lieven's objection, Mr. Canning on the 24th July, 1824, wrote:—

Ibid., Appendix, vol. ii, p. 66.

Shutting up of Behring Straits not to be tolerated by England.

"The Power which could think of making the Pacific a *mare clausum* may not unnaturally be supposed capable of a disposition to apply the same character to a strait comprehended between two shores of which it becomes the undisputed owner; *but the shutting up of Behring's Straits, or the power to shut them up hereafter, would be a thing not to be tolerated by England.* Nor could we submit to be excluded, either positively or constructively, from a sea in which the skill and science of our seamen has been (and is still) employed in enterprises interesting not to this country alone, but to the whole civilized world."

It cannot be supposed that Mr. Canning, while insisting upon the freedom of Behring Strait and the Arctic Ocean, was at the same time conceding to Russia the right to exclude vessels from the non-territorial waters of Behring Sea.

In August 1824 the Russian Plenipotentiaries delivered to Sir C. Bagot a "Contre-Projet," containing the following Articles:—

"ARTICLE V.

"Les Hautes Puissances Contractantes stipulent en outre que leurs sujets respectifs navigueront librement, sur toute l'étendue de l'Océan Pacifique, tant au nord qu'au sud, sans entrave quelconque, et qu'ils jouiront du droit de pêche en haute mer, mais que ce droit ne pourra jamais être exercé qu'à la distance de 2 lieues marines des côtes ou possessions, soit Russes, soit Britanniques.

British Case, Appendix, vol. ii, Part I, p 69.

"ARTICLE VI.

"Sa Majesté l'Empereur de Toutes les Russies, voulant même donner une preuve particulière de ses égards pour les intérêts des sujets de Sa Majesté Britannique et rendre plus utile le succès des entreprises, qui auraient pour résultat de découvrir un passage au nord du Continent Américain, consent à ce que la liberté de navigation mentionnée en l'Article précédent s'étende sous les mêmes conditions, au Détroit de Behring et à la mer située au nord de ce détroit."

Ibid., p. 70

The negotiations, however, were broken off, as reported by Sir C. Bagot, who wrote that on certain points differences had arisen which appeared to be irreconcilable.

Ibid., p. 67.

One of the points on which the Russian Plenipotentiaries refused to yield was the proposal, embodied in Article V of the British "Projet," in so far as it permitted British subjects to visit, for a stated period, the gulfs, havens, and creeks in places not already occupied on the north-west coast of America from 60° north latitude to Behring Straits. This coast they declared to be the absolute and undisputed territory of His Imperial Majesty, and they added that it was not the intention of His Imperial Majesty to grant to any Power whatever for any period of time the liberty which was required.

But the stipulation for the free navigation of the high seas, which was afterwards embodied in Article I of the Treaty, was not one of the points upon which differences arose, and the Russian Plenipotentiaries do not appear to have raised any

Russia does not object to British "Projet" on ground of exceptional rights in Behring Sea.

objection to the British proposal, on the ground that Russia possessed exceptional rights over the non-territorial waters of Behring Sea.

Article VI of their "Contre-Projet" indicates that they had no claim to exclude foreign vessels from waters south of the Arctic Ocean and Behring Strait. This Article purports, as a concession, to waive any such rights in respect of the last-mentioned ocean and strait, but Behring Sea is not named.

British Case, Appendix, vol. ii, Part I, p. 68.

Sir C. Bagot, on the suspension of the negotiations, reminded the Russian Plenipotentiaries that the claim to maritime jurisdiction assumed by Russia in the Pacific, which he had hoped to see revoked in the simplest and least unpleasant manner, by mixing it with a general adjustment of other points, remained, by the breaking off of the negotiations, still unretracted; and that his Government would probably be of opinion that, upon that part of the question, some arrangement must nevertheless be entered into.

Ibid.

With reference to the sixth Article of the "Contre-Projet," he wrote as follows:—

> "I gave the Russian Plenipotentiaries distinctly to understand that neither His Majesty's Government nor those of the other Maritime Powers of the world would, as I thought, be likely to accept the free navigation of Behring Strait as a concession on the part of Russia."

United States' Case, p. 55.

In the United States' Case great stress is laid upon the fact that Russia, after the execution of the Treaty with the United States, and before the conclusion of the Treaty with Great Britain, sought to place an interpretation upon the former Treaty which is not in accord with the interpretation now put upon it by Great Britain. This interpretation is contained in a Report, dated the 21st July, 1824, of the Conference of a Special Committee of certain Russian dignitaries, which Conference had been brought together for the purpose of replying to certain questions raised by the Russian-American Company upon the Treaty.

Conference of Russian dignitaries.

Appendix, vol. i, p. 32 *et seq.*

This document has been produced for the first time in the United States' Case. It is in no sense an international document. Further, the questions put by the North American Company, to which it purports to be an answer, are not produced.

Moreover, the translation of the Report cited in the United States' Case is inaccurate in most

to British
exceptional

important particulars. The translation given in the United States' Case is as follows, the words appearing between brackets being simple interpolations:—

United States' Case, pp. 54, 55. (For revised translation, see Appendix, vol. i, p. 34.)

"7. That since the sovereignty of Russia over the shores of Siberia [AND AMERICA], as well as over the Aleutian Islands [AND THE INTERVENING SEAS], has long since been acknowledged by all Powers, these coasts, islands [AND SEAS] just named could not have been referred to in the Articles of the above-mentioned Convention, which latter concerns only the disputed territory on the north-west coast of America and the adjoining islands, and that in the full assurance of such undisputed right Russia has long since established permanent Settlements on the coast of Siberia, as well as on the chain of the Aleutian Islands; consequently, American subjects could not, on the strength of Article II of the Convention of the 5th (17th) April, have made landings on the coast, or carried on hunting and fishing without the permission of our Commanders or Governors. These coasts of Siberia and of the Aleutian Islands are not washed by the Southern or Pacific Ocean, of which mention is made in Article I of the Convention, but by the Arctic Ocean and the Seas of Kamchatka and Okhotsk, which, on all authentic Charts and in all geographies, form no part of the Southern or Pacific Ocean."

From this Report, it may be gathered that the two following points had been raised by the Company:—

1. It was thought that Article I of the Convention permitted citizens of the United States to resort to the coast upon points not already occupied upon the shores of Siberia and the Aleutian Islands for the purpose of trading with the natives.

2. The Company desired to confine the right of fishing and trading, granted to the United States for ten years by Article IV, to the coast south of Cross' Sound.

It was to meet the first of these points that the argument that Behring Sea is not part of the Pacific Ocean, or South Sea, was for the first time suggested in the above Report.

Upon the second point, the Committee expressed the opinion that Yakutat or Behring Bay was situated—

Revised translation, Appendix, vol. i, p. 35.

"in a latitude [59° 30' north] where the rights of Russia have never formed a subject of dispute, and that this important circumstance permits us to include it in the general declaration concerning the Aleutian Islands and the other northern places."

Revised translation, Appendix, vol. i, p. 35.

As to Cross' Sound, the Committee agreed that—

"as it lies under the 57th degree of north latitude, and consequently within the limits of those islands and regions to which Russia's right of sovereignty has been disputed, it is impracticable to apply the same rule."

Accordingly, on the suggestion of the Committee, Baron Tuyll, Russian Minister at Washington, was instructed by his Government to propose to Mr. Adams that Cross' Sound should be the northern limit, to which the right of fishing and trading for the stipulated period of ten years should be confined.

No copies, however, are forthcoming of the instructions given by the Russian Government to Baron Tuyll, nor are any copies of the despatches from the Baron to his Government, or the subsequent reports of the result of the negotiations, now produced. What actually took place between Baron Tuyll and Mr. Adams is best told by quotation from Mr. Adams' diary.

Mr. Adams' account of this transaction is as follows:—

Memoirs of J. Q. Adams, vol. vi, p. 435.

"6th, *Monday.*—Baron Tuyll, the Russian Minister, wrote me a note requesting an immediate interview, in consequence of instructions received yesterday from his Court. He came, and, after intimating that he was under some embarrassment in executing his instructions, said that the Russian-American Company, upon learning the purport of the North-west Coast Convention concluded last June by Mr. Middleton, were extremely dissatisfied ('a jeté de hauts cris'), and, by means of their influence, had prevailed upon his Government to send him these instructions upon two points. One was, that he should deliver, upon the exchange of the ratifications of the Convention, an explanatory note, purporting that the Russian Government did not understand that the Convention would give liberty to the citizens of the United States to trade on the coast of Siberia and the Aleutian Islands. The other was, to propose a modification of the Convention, by which our vessels should be prohibited from trading on the North-west Coast north of latitude 57°. With regard to the former of these points, he left with me a minute in writing.

"I told him that we should be disposed to do everything to accommodate the views of his Government that was in our power, but that a modification of the Convention *could* be made no otherwise than by a new Convention, and that the construction of the Convention as concluded belonged to other Departments of the Government, for which the Executive had no authority to stipulate; that if on the exchange of the ratifications he should deliver to me a note of the purport of that which he now informally

gave me, I should give him an answer of that import, namely, that the construction of treaties depending here upon the judiciary tribunals [the Executive Government, even if disposed to acquiesce in that of the Russian Government as announced by him, could not be binding upon the Courts, nor upon this nation.]* I added that the Convention would be submitted immediately to the Senate; that if anything affecting its construction, or, still more, modifying its meaning, were to be presented on the part of the Russian Government before, or at the exchange of, ratifications, it must be laid before the Senate, and could have no other possible effect than of starting doubts, and perhaps hesitation, in that body, and of favouring the views of those, if such there were, who might wish to defeat the ratification itself of the Convention. This was an object of great solicitude to both Governments, not only for the adjustment of a difficult question which had arisen between them, but for the promotion of that harmony which was so much in the policy of the two countries, which might emphatically be termed natural friends to each other. If, therefore, he would permit me to suggest to him what I thought would be the best course, it would be to wait for the exchange of the ratifications, and make it purely and simply; that afterwards, if the instructions of his Government were imperative, he might present the note, to which I now informed him what would be in substance my answer. It necessarily could not be otherwise. But if his instructions left it discretionary with him, he would do still better to inform his Government of the state of things here, of the purport of our conference, and of what my answer must be if he should present the note. I believed his Court would then deem it best that he should not present the note at all. Their apprehensions had been excited by an interest not very friendly to the good understanding between the United States and Russia. Our merchants would not go to trouble the Russians on the coast of Siberia, or north of the 57th degree of latitude, and it was wisest not to put such fancies into their heads. At least, the Imperial Government might wait to see the operation of the Convention before taking any further step, and I was confident they would hear no complaint resulting from it. If they should, then would be the time for adjusting the construction or negotiating a modification of the Convention; and whoever might be at the head of the Administration of the United States, he might be assured that every disposition would be cherished to remove all causes of dissatisfaction, and to accommodate the wishes and the just policy of the Emperor.

"The Baron said that these ideas had occurred to himself; that he had made this application in pursuance

* This passage does not appear in Mr. Blaine's quotation from Mr. Adams' diary (United States' Case, Appendix, vol. i, p. 277) It is important, inasmuch as it indicates that the United States' Government were not disposed to acquiesce in the proposed construction of the Treaty.

of his instructions; but he was aware of the distribution of powers in our Constitution, and of the incompetency of the Executive to adjust such questions. He would therefore wait for the exchange of the ratifications without presenting his note, and reserve for future consideration whether to present it shortly afterwards, or to inform his Court of what he has done, and ask their further instructions upon what he shall definitively do on the subject. He therefore requested me to consider what had now passed between us as if it had not taken place ('non avenu'), to which I readily assented, assuring him, as I had done heretofore, that the President had the highest personal confidence in him, and in his exertions to foster the harmony between the two countries. I reported immediately to the President the substance of this conversation, and he concurred in the propriety of the Baron's final determination."

As will be seen from the above account of the negotiations, no note whatever was presented by Baron Tuyll. In point of fact, it is not clear that any note was even written. The document produced by the United States, and purporting to be a copy of the note, is headed "Note explicative à présenter," and would appear to be nothing more than a draft Minute of a note. The following is the text of this draft note:—

Appendix, vol. i, p. 63.

'Note explicative à présenter au Gouvernement des États-Unis lors de l'échange des ratifications dans le but d'écarter d'autant plus sûrement tout motif de discussions futures, au moyen de laquelle note on reconnoitroit positivement exceptées de la liberté de chasse, de pêche, et de commerce, stipulée en faveur des citoyens des États-Unis pour dix ans, *les Iles Aleutiennes, les côtes de la Sibérie, et en général les possessions Russes sur la côte nord-ouest de l'Amérique jusqu'au 59° 30' de latitude nord.*

"Il parait que ceci n'est qu'une conséquence naturelle des stipulations arrêtées, car les *côtes de la Sibérie* sont baignées par la Mer d'Ochotsk, la Mer de Kamtschatka, et la Mer Glaciale, et non par la Mer du Sud mentionnée dans l'Article 1er de la Convention du 5 (17) Avril. C'est aussi par la Mer du Kamtschatka ou l'Océan du Nord, que sont baignées les Iles Aleutiennes.

"L'intention de la Russie n'est point d'entraver la libre navigation de l'Océan Pacifique. Elle se bornerait à faire reconnoitre comme bien entendu et placé à l'abri de toute espèce de doute le principe, que depuis le 59° 30' aucun vaisseau étranger ne pourrait approcher de ses côtes et ses iles, ni y faire la chasse ou la pêche qu'à la distance de 2 lieues marines. Ce qui n'empêchera pas d'accueillir les bâtimens étrangers avariés ou battus par la tempête."

It is stated in Mr. Blaine's despatch of the 17th December, 1890, that this Minute or

Memorandum was not presented at the time of the exchange of ratifications, but was communicated a fortnight afterwards. It does not appear to have received any acknowledgment or reply, and the whole proceedings seem to have been entirely informal.

Baron Tuyll, while arguing that Behring Sea was unaffected by Treaty, impliedly admits it open to the world.

In any case, neither here, nor in the conversation with Mr. Adams above referred to, did Baron Tuyll suggest that Behring Sea was closed, or that his Government claimed a margin of 100 miles from the shores. His argument was that the *Treaty* did not apply to that sea, and that the United States were remitted there to the ordinary rights of independent nations on the high seas. What he says as to the reception of ships in distress assumes that ships will be passing; and the 2 leagues is treated as the limit of territorial jurisdiction.

To the above may be added the account of the same transaction which is given by the Russian writer, Tikhmenieff :—

British Case, Appendix, vol. i, p. 39.

"As the Convention had not yet been ratified, the Emperor, on the representation of the Company that they would be injured by that part of the Convention to which we have referred, ordered inquiry to be made into the matter by a Special Commission. In the Protocol of the Commission, which was approved by the Emperor, it was declared, *inter alia*, that the provision of the Convention granting to the citizens of the United States the right to fish in the waters of the Colony, and to trade with the inhabitants of the coast, must not be understood as giving them a right to approach the coast of Eastern Siberia, and the Aleutian and Kurile Islands, which had long been recognized by the other Powers as being under the exclusive dominion of Russia, and that that provision only applied to the disputed territory on the north-west coast of America, between 54° 40′ and 57°.

"In consequence of this declaration the Head of the Foreign Office and the Commission were of opinion that in order to safeguard the rights of the Company, and to obviate the possibility of the Convention being wrongly interpreted, the Russian Minister to the United States should be instructed to make a formal explanatory declaration on the occasion of the exchange of the ratifications of the Convention. The Minister reported that he did not see his way to carrying out these instructions, and that the only way in which he could explain the provision in question to the Washington Cabinet was by a verbal note: he added that a formal declaration might give rise to serious disputes, prevent the ratification of the Convention, and produce an effect which was not intended, by arousing suspicions which would otherwise never be entertained. The Convention was accordingly ratified."

Upon the subject of the Report of the Committee, and the attempt at negotiation which resulted from it, the following observations arise:—

1. That the Russian-American Company were only anxious about trade and fishing on the coast, and were not concerned about Behring Sea.

2. That Baron Tuyll did not claim for Russia jurisdiction of any kind over Behring Sea; for he states in his draft note that Russia would be satisfied with a limit of 2 marine leagues to the north of 59° 30′.

3. That the interpretation of the words "Pacific Ocean or South Sea," in Article I of the Convention, upon which the Government of the United States now base their argument, was first suggested *after* the conclusion of the Convention, and with the express purpose of reconciling the Directors of the Russian-American Company to the terms of that Article.

4. That Mr. Adams declined the overtures of Baron Tuyll and the interpretation desired to be put upon the Treaty, and that the Convention was finally ratified in its original terms, without explanation or modification.

5. That throughout the protests and negotiations which preceded the Treaties of 1824 and 1825, the term "Pacific Ocean" was used to include Behring Sea, and the term "North-west Coast" to include the whole west coast of America from Behring Strait to 51 north latitude.

6. That no distinction is drawn in the Treaty with Great Britain in 1825 between Behring Sea and the rest of the Pacific Ocean, though the attention of the Russian Government had been forcibly called to the point by the remonstrances of the Russian-American Company (upon the conclusion of the Treaty with the United States) to the advisability of excluding certain parts of the coasts of Behring Sea.

It would seem very plain, therefore, that the claim to maritime jurisdiction was the one to which both England and the United States attached importance; that against it their protests, which were emphatic and unqualified, were mainly directed; and that they demanded and obtained not a partial, but a total and unconditional withdrawal of it.

From the considerations referred to in this chapter, it is submitted that the conclusions claimed to have been established in the British Case, as stated at p. 58, are fully supported, and that the further evidence which has been adduced, clearly shows that the Ukase of 1821—the first and only attempt on the part of Russia to assert dominion over, and restrict the rights of other nations in, the non-territorial waters of the North Pacific, including those of Behring Sea—was made the subject of immediate and emphatic protest by Great Britain and by the United States. That thereupon Russia unequivocally withdrew her claims to such exclusive dominion and control.

British Case, p. 58. Conclusions.

Russia withdrew her claim to control of Behring Sea.

CHAPTER III.

HEAD (C).—*The question whether the body of water now known as Behring Sea is included in the phrase "Pacific Ocean," as used in the Treaty of 1825 between Great Britain and Russia.*

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 26—

"By which term [north-west coast of the American Continent] it is intended to designate the coast between Prince William Sound and the mouth of the Columbia River."

(2.) United States' Case, p. 52—

"That the term 'Great Ocean, commonly called the Pacific Ocean or South Sea,' used in Article I of the treaty of 1824 with the United States, and the term 'The Ocean, commonly called the Pacific Ocean,' used in Article I of the Treaty of 1825 with Great Britain, did not apply to and include Bering Sea, is shown by a study of the maps, charts, and writings of navigators at the time of and prior to the negotiation and celebration of these treaties. A list of these maps and charts is appended hereto, and a careful examination of the same is invited. It will be seen from them that the best geographers have at all times distinguished this body of water from the ocean lying south of it by conferring upon it some separate name, in most cases either that of Sea of Kamchatka, Bering Sea, North-eastern Sea, or Eastern Ocean."

(3.) United States' Case, p. 57—

"By the ukase of 1821, Russia had publicly claimed certain unusual jurisdiction both over Bering Sea and over a portion of the Pacific Ocean, yet in the resulting treaties, which constituted a complete settlement of all differences growing out of this ukase, no reference is made to this jurisdiction so far as it related to Bering Sea, although it is expressly and conspicuously renounced as to the Pacific Ocean."

(4.) United States' Case, p. 58—

"It appears from an examination of the correspondence and treaties . . . . . that the coasts, interior waters, &c., upon and in which the United States and Great Britain were allowed to trade for ten years without restrictions, were limited on the west by Yakutat Bay and Mount St. Elias; that is to say, that this right was restricted to the coast-line, concerning the ownership of which there may have been some possible dispute."*

* "Article IV of the Treaty of 1824, and Article VII of the Treaty of 1825."

(5.) United States' Case, p. 69—

"That the body of water known as Bering Sea was not included in the phrase 'Pacific Ocean,' as used in the treaty of 1825."

(6.) United States' Case, p. 297—

"That Bering Sea was not included in the phrase 'Pacific Ocean' as used in the treaty of 1825."

(7.) United States' Case, p. 302—

"That the body of water now known as Bering Sea was not included in the phrase 'Pacific Ocean,' as used in the treaty of 1825."

SUMMARY OF BRITISH REPLY.

A more exhaustive collection of Maps and Charts proves that "Pacific Ocean" includes Behring Sea. Not one has been found which, having regard to the relative sizes and positions of the names, is an authority to the contrary. In Charters of the Russian American Company, the Kurile Islands, which lie outside Behring Sea, but in the Pacific Ocean, are said to be in "North-Eastern Ocean," or North-Eastern Sea; the identity of which with the Pacific Ocean is thus demonstrated.

Apart from the evidence afforded by Maps, and by the previous negotiations, that the words "Pacific Ocean" in the Treaties included Behring Sea, the same is proved from the Treaties themselves. Both, for ten years, throw open to the subjects of the Contracting Powers the harbours on the north-west coast; which coast is not defined by interpretation clause; and is shown by the preliminary correspondence, and by Article III of the 1825 Treaty, to have reached to Behring Strait. The throwing open of the harbours assumes the right of approach thereto, and refutes the supposition that Behring Sea was closed.

The interpretation of the term "north-west coast" in Contention (1.) is now suggested, without reason assigned, after three other interpretations had been put forward by the United States, and answered by Great Britain, in the correspondence preceding the Arbitration Treaty. Two of the three do not reappear in the United States' Case; and the survivor, which forms Contention (4.) is that "north-west coast" in both Treaties means what is called in the Treaty of 1825 the "lisière." But it did not mean this in the Treaty of 1824; for no "lisière" is mentioned therein, or was in question between the parties. Nor in the Treaty of 1825 could "north-west coast" have meant the "lisière," as the right to use harbours is carefully expressed to be reciprocal, and to apply to both Powers, while the "lisière" was to belong exclusively to Russia. Further, the second Articles of the Treaties bind Russian subjects not to land, without permission, at United States' and British establishments on the "north-west coast."

The above construction of "north-west coast" is confirmed by the use of the term "north-western coast," manifestly to include the east coast of Behring Sea, in a form of Patent prepared by the Russian Government, pursuant to the Slave Trade Treaty of the 20th December, 1841; and by the use of the term "north-west coast" in Treaties of Commerce between Great Britain and Russia, dated the 11th January, 1843, and 12th January, 1859.

Contention that geographers exclude Behring Sea from Pacific Ocean.

United States' Case, p. 52.

With reference to the above-quoted assertions that the terms "Great Ocean, commonly called the Pacific Ocean or South Sea," and "the Ocean, commonly called the Pacific Ocean," as used in the Treaties, are shown by a study of the contemporaneous Maps, Charts, and writings of navigators not to have applied to or to have included Behring Sea, the following observations may be made.

The Maps and Charts, of which a list is given in the Appendix to the United States' Case, are said to prove that—

"the best geographers have at all times distinguished the body of water from the ocean lying south of it by conferring upon it some separate name. . . . ."

United States Case, Appendix, vol. i, p. 265.

This list of Maps is the list inclosed by Mr. Blaine to Sir Julian Pauncefote in his letter of the 17th December, 1890, with a statement that it represented—

"a large proportion of the most authentic Maps published during ninety years prior to 1825 in Great Britain, in the United States, the Netherlands, France, Spain, Germany, and Russia."

Mr. Blaine's list of Maps very incomplete.

Appendix, vol. i, pp. 86 *et seq.*

A criticism of this list of Maps will be found in the Appendix to this Counter-Case. It is sufficient here to point out that the list is very incomplete, and that a great many Maps which should undoubtedly have come to the notice of the compiler are omitted therefrom, as in some cases but a single Map is quoted from an Atlas containing other Maps so marked as to tell against the contention which it is endeavoured to maintain.

Size and position of names on Maps to be considered.

Neither has any attention been paid by the compiler of the list to the relative sizes of the characters in which the names quoted by him appear on the Maps cited, nor to the positions which these names occupy. An examination of these points, on such of the Maps included in the list as have been obtained in identical editions, show, in fact, that in a large proportion of instances the names Sea of Kamtchatka, &c., mentioned in quoted Contentions, are so placed as to refer merely to limited portions of the body of water now known as Behring Sea.

Many authentic Maps give Behring Sea no distinctive name.

Ibid., vol. i, p. 94.

A list of Maps contained in the Appendix to this Counter-Case, in the compilation of which no special selection has been made other than that relating to their date of publication, appears in fact to show that, in more than half of the authentic Maps relating to the period in question, Behring Sea appeared without any distinctive name.

Though described by Mr. Blaine as showing "the opinion of a large part of the civilized world" during the ninety years prior to 1825, it is therefore submitted that this description is inaccurate.

United States' Case, pp. 53, 35.

It is in the Case of the United States further affirmed that the term "North-eastern Sea," or "Eastern Ocean," is an alternative name for the body of water now generally known as Behring

Sea. It is necessary on the part of the United States to assume this position, because of the mention made of the "North-eastern Ocean" and "North-eastern Sea" in the first and third Charters of the Russian-American Company, in which these terms are employed in defining the field of the operations of that Company; and the use of the terms mentioned in these Charters is referred to in the Case of the United States as supporting its contention. But on turning to the correct translation of the Charter of 1799, it will be found that the Company is—

Ante, p. 11.

"to enjoy the profits of all industries and establishments now existing on the north-eastern coast* of America, from the aforesaid 55° to Behring Strait, and beyond; that strait, as well as on the *Aleutian and Kurile Islands, and the other islands situated in the North-Eastern Ocean.*"

In section 1 of the third Charter, the Russian-American Company is referred to as being—

United States' Case, p. 28.

"established for trading on the continent of North-Western America and on the Aleutian and Kurile Islands, as in every part of the North-Eastern Sea," &c.

"North-Eastern Sea" (or Ocean) means Pacific Ocean, as is proved by inclusion of Kurile Islands therein.

The above quotations are destructive of the conclusion endeavoured to be established. It is evident from both passages that the term "North-Eastern Ocean" or "North-Eastern Sea" was employed not as a special designation of Behring Sea, but as a synonym of Pacific Ocean. The Kurile Islands are in the Pacific Ocean, but wholly outside Behring Sea.

"Eastern Ocean" means Pacific Ocean.

With regard to the alternative term "Eastern Ocean," two authorities are quoted in the Case of the United States with the object of showing that by this name Behring Sea was indicated, viz., "Coxe's Russian Discoveries," and a globe by D. Adams, London, dated 1797. For details respecting these, the Appendix to this Counter-Case must be referred to. It may here be stated, however, that, in Coxe's work, "Eastern Ocean" is again found to be a synonym for the Pacific Ocean, and that the names upon the globes published by Adams do not appear to throw any light upon the matter.

United States' Case, p. 53.
Ibid., Appendix I, p. 290.
Appendix, vol. i, pp. 103, 104.

From the notes given in the Appendix, the meaning of the term "Eastern Ocean" (which, though comparatively seldom used, is to be found on some Maps) is clearly shown to be synonymous with the Pacific Ocean. Attention

Ibid., pp. 103, 104.

* See p. 11.

is particularly drawn to the several Russian Maps there enumerated.

British Case, Appendix, vol. iii. "United States No. 1 (1891)," pp. 88, 89.

Any argument founded on the use of a particular name by geographers may be conclusively answered by the following quotation from Lord Salisbury's despatch, dated the 21st February, 1891:—

"But I am not prepared to admit the justice of Mr. Blaine's contention that the words 'Pacific Ocean' did not include Behring Sea. I believe that in common parlance, then and now, Behring Sea was and is part of the Pacific Ocean; and that the latter words were used in order to give the fullest and widest scope possible to the claim which the British negotiators were solemnly recording of a right freely to navigate and fish in every part of it, and throughout its entire extent. In proof of the argument that the words 'Pacific Ocean' do not include Behring Sea, Mr. Blaine adduces a long list of Maps in which a designation distinct from that of 'Pacific Ocean' is given to Behring Sea; either 'Behring Sea,' or 'Sea of Kamschatka,' or the 'Sea of Anadir.' The argument will hardly have any force unless it is applicable with equal truth to all the other oceans of the world. But no one will dispute that the Bay of Biscay forms part of the Atlantic Ocean, or that the Gulf of Lyons forms part of the Mediterranean Sea; and yet in most Maps it will be found that to those portions of the larger sea a separate designation has been given. The question whether by the words 'Pacific Ocean' the negotiators meant to include or to exclude Behring Sea depends upon which location was esteemed to be the correct usage at the time. The date is not a distant one, and there is no ground for suggesting that the usage has changed since the Anglo-Russian Treaty of 1825 was signed. The determination of this point will be most satisfactorily ascertained by consulting the ordinary books of reference. I append to this despatch a list of some thirty works of this class, of various dates from 1795 downwards, and printed in various countries, which combine to show that, in customary parlance, the words 'Pacific Ocean' do include Behring Sea."

Bays and gulfs are none the less part of the main sea for having a specific name, *e.g.*, Bay of Biscay and Gulf of Lyons.

Appendix, vol. i. pp. 86 *et seq.*

The list referred to in the above quotation has been greatly increased, and is printed in an Appendix to this Counter-Case. The special attention of the Arbitrators is invited to the language of the various authors cited, which leaves no doubt whatever but that, at the date of the Treaty, Behring Sea was, as it still is, regarded by geographers as part of the Pacific Ocean.

British Case, Appendix, vol. ii, Part III, p. 4.

The language of the Treaty of Cession of Russia to the United States in the year 1867 is entirely in accordance with the contention of Her Majesty's Government; for in that document,

Commander Islands are described in the Treaty of 1867 as in Pacific Ocean.

it will be found that the Commander Islands are properly described as being in the Pacific Ocean.

An attempt is apparently made in the Case of the United States to support the theory that Behring Sea is a body of water distinct in its nature from the Pacific Ocean, by the terms in which the geographical sketch of this sea are set out in the opening pages. The geographical sketch there given, though brief, is, it is submitted, essentially misleading in its character.

Geographical sketch of Behring Sea in United States' Case, misleading.

On p. 13 of the United States' Case, the Peninsula of Alaska is described, apparently for the single purpose of stating that in it there are—

United States' Case, p. 13.

"low-lying marshy gaps which form portages used by the natives for carrying their boats across *from the Pacific Ocean to Bristol Bay*."

As authority for this statement, Réclus' "Geographie," vol. xv, p. 201, is cited; but, on turning to this work, we find that the passage thus paraphrased actually reads as follows:—

" . . . Les montagnes péninsulaires de l'Alaska . . . . sont coupées de distance en distance par des seuils très bas, des portages—en Russe 'perenossi'—que les bateliers pratiquent en effet pour le transport de leurs barques *d'un versant à l'autre versant*."

Réclus, in fact, makes no mention in this connection of the Pacific Ocean or of Bristol Bay; nor does he convey the impression that Bristol Bay is no part of that ocean.

Respecting the connection of Behring Sea with the main body of the Pacific Ocean, it is further stated in the sketch, with reference to the Aleutian Islands, that—

Ibid., p. 14.

"the straits or passes separating the islands are of various widths, those in the easterly half being generally narrow and but few of them available for navigation. The most important are Unimak Pass, 11 miles wide, and Amukta or 'Seventy-two' Pass, 42 miles wide."

This, again, is misleading.

The largest of the Aleutian Islands are near the coast of America. In proceeding westwards they become smaller, and the openings between them wider, until they end at Attu Island, 600 miles from the extremity of the Peninsula of Kamtchatka, and 370 miles from the nearest part of that land. In the Fox Islands, forming the eastern group of the Aleutians, there are

only a few straits, the most important being the Unimak, 11 miles wide; but Akutan and Unalga Passes are also navigable.

The following is a list of the openings into Behring Sea:—

	Geographical miles.
Unimak Pass	18½
Akutan Pass	2½
Unalga Pass	1½
Umnak Pass	3
Adugakh Island (western of Fox Islands) to Kagamil Island	18
Kagamil Island to Chuginadak Island (2 openings)	4
Chuginadak Island to Yunaska Island ..	15
Yunaska Island to Amukhta Island (2 openings)	11
Amukhta Pass	35
Siguam Pass	12¾
Amlia Island to Atka Island	1¾
Atka Island to Ianaga Island (9 openings) ..	22
Ianaga Island to Illakh Island	14½
Illakh Island to Ugidakh Island	9
Amatignak Island to Amchitka Island ..	50
Amchitka Island to Kyska Island (3 openings)..	23½
Kyska Island to Bouldir Island	64
Bouldir Island to Semitchi Islands	52
Semitchi Islands to Attu Island	15
Attu Island to Copper Island	190
Copper Island to Behring Island	26
Behring Island to Kamtchatka	95
Total	684

Of 1,060 miles between western end of Fox Islands and coast of Asia, 668 are sea.

It is thus seen that, on the southerly limit of Behring Sea, from the western end of the Fox Islands to the coast of Asia, a distance of some 1,060 geographical miles, there are about 660 miles of sea, being nearly two-thirds of the entire distance.

Examination of Treaties of 1824 and 1825.

Having shown in the last Chapter that the whole sea area comprised in the Ukase of 1821 was, from first to last, without exception of Behring Sea, the subject of the negotiations resulting in the Treaties of 1824 and 1825; and having now shown that, by the usage of geographers, the term "Pacific Ocean" includes Behring Sea, it is of importance to examine the Treaties themselves.

Treaty of 1824 summarized.

British Case, p. 52. The original text is in Appendix, vol. ii, Part III, p. 12.

The first is that between the United States and Russia. By Article I, it is agreed that in any part of the Pacific Ocean the citizens or subjects of the two Powers are not to be disturbed in navigation or fishing, or in resorting to the coasts, on unoccupied points, for the purpose of trading

with the natives. By Article II, United States' citizens are not to resort to any point where there is a Russian establishment, without permission; nor are Russian subjects to resort without permission to any establishment of the United States on the north-west coast. By Article III, establishments are not to be formed on the north-west coast of America, by United States' citizens to the north, or by Russian subjects to the south, of latitude 54° 40′. By Article IV, during a term of ten years, the ships of both countries may reciprocally frequent the interior seas, gulfs, harbours, and creeks upon the coast mentioned in the preceding Article, for fishing and trading with the natives.

The effect of Article IV, as far as United States' citizens are concerned, is that they may for ten years frequent the interior seas, &c., on that part of the north-west coast assigned to Russia. The liberty to do this assumes that the outer seas, which afford access to the interior seas, are not closed. If, then, the north-west coast includes the coast of Behring Sea, neither that sea, as a whole, nor a margin of 100 miles, was closed. The supposition that it was closed necessitates a restricted interpretation of the term "north-west coast": a necessity to which the United States' Government and their advisers have shown themselves fully alive.

If "north-west coast" includes Behring Sea coast, Behring Sea is in Pacific Ocean.

It is proved in the British Case, by numerous extracts from the correspondence which preceded the Treaties, that the words "north-west coast" were used, throughout the negotiations, to include not less than the whole of the North American coast from Behring Strait to latitude 51° north.

British Case, p. 60.

"North-west coast" was used throughout preliminary negotiations to include coast from Behring Strait to latitude 51° north.

On what the definition of "north-west coast" in Contention (1.) is founded, the United States' Case does not explain. If the framers of the Treaty of 1824 had meant to limit this very general term to the coast between Prince William Sound and the Columbia River an interpretation clause might have been expected. Perhaps more need not be said of this definition than that it is produced now, after three other interpretations of the term in dispute had been put forward by the United States in the correspondence preceding the Arbitration Treaty, and answered by the British Government.

Definition in Contention (1.) propounded after three others had been answered in correspondence.

In a despatch to Sir J. Pauncefote, dated the 30th June, 1890, Mr. Blaine criticizes the Treaties of 1824 and 1825, and says it is

On the 30th June, 1890, Mr Blaine thought it "plain" that "north-west coast" was only from 50° to 60° north latitude.

British Case, Appendix, vol. iii. "United States No. 2 (1890)," No. 497, p. 504.

But on the 17th December, 1890, he included eight more degrees.

Ibid., "United States No. 1 (1891)," No. 37, p. 38.

"plain" that they both limited the "north-west coast" to the coast between 50° and 60° north latitude. But in another, dated the 17th December, 1890, where he discusses the meaning of "Pacific Ocean" and "north-west coast" at length, observing that the dispute as to the former phrase "prominently involves" the meaning of the latter, he contends that "north-west coast" means the coast from *42°* to 60° north latitude. Neither contention has been thought worthy of insertion in the United States' Case.

Contention (4.) limits "north-west coast" to the "lisière" as defined in Treaty of 1825.

The remaining interpretation has survived in the form of Contention (4.). The coast-line therein referred to, is plainly the "lisière" defined in the Treaty of 1825. This is the narrow strip of coast from 56° north latitude to the point of intersection of the 141st degree of west longitude. But that the words "north-west coast," as used in the Treaty of 1824, do not mean the "lisière" so defined, is evident from this one consideration; that the limits of that "lisière," finally adopted, and embodied in the Treaty of 1825, had not even been proposed when the Treaty of 1824 was signed; and all negotiations between Great Britain and Russia had been suspended. This Treaty bears date the 17th April, 1824, and naturally contains no mention of any "lisière." *A* "lisière" had been under discussion between the British and Russian Governments, of which the boundaries were from time to time variously defined by "projet" and "contre-projet;" but no one of these definitions had taken the shape finally agreed on, even as late as the 8th December, 1824, when Mr. G. Canning wrote to Mr. S. Canning as follows:—

But the "lisière" is not mentioned in Treaty of 1824; nor had its final limits been proposed; and negotiations for Treaty of 1825 had been suspended.

Great Britain proposes to adopt Article IV of American Treaty, with its *reciprocal* liberty of access to north-west coast.

British Case, Appendix, vol ii, Part I, p. 74

"We are content also to assign the period of ten years for the *reciprocal* liberty of access and commerce *with each other's territories*, which stipulation may be best stated precisely in the terms of Article IV of the American Convention."

But the "lisière" was to belong to Russia.

This shows that Mr. Canning did not understand the term "north-west coast" to be confined to the "lisière," the proposals relating to which had one unvarying condition, namely, that it was to belong to Russia. Had the term been so confined, the careful provision of Article IV, that "the ships of *both* Powers, or which belong to their citizens or subjects *respectively*, may *reciprocally* frequent, without any hindrance

whatever, the interior seas," &c., becomes meaningless as far as any advantage to Russia is concerned. Further, Article II concludes thus:—

Further, Article II of American Treaty gives Russian subjects access to United States' establishments on north-west coast.

"Reciprocally, the subjects of Russia shall not resort, without permission, *to any establishment of the United States upon the north-west coast.*"

Mr. Blaine says first Articles of each Treaty are identical.

Passing now to the Treaty of 1825, Mr. Blaine, in the despatch of the 17th December, 1890, above mentioned, says:—

British Case, p. 53. For the original text, see Appendix, vol. ii, Part III, p. 2.

"I quote the first Articles of each Treaty, for, to all intents and purposes, they are identical in meaning, though differing somewhat in phrase."

British Case, Appendix, vol. iii. "United States No. 1 (1891)," p. 38.

Therefore, if one includes Behring Sea, the other does.

If, then, the considerations set forth above have any weight as showing that, in the first Treaty, "Pacific Ocean" includes Behring Sea, they have the same weight as showing that, in the second Treaty, "Pacific Ocean" includes Behring Sea.

Article II of 1825 Treaty speaks of *British* establishments on "north-west coast," proving that that coast was not confined to the "lisière."

Article II, likewise, is in substantially the same form in each Treaty, that of 1825 concluding thus:—

"Russian subjects shall not land without permission at any British establishment on the north-west coast."

Therefore, "north-west coast" here, too, cannot mean the "lisière."

Article III, in the original French, begins:—

"La ligne de démarcation entre les possessions des Hautes Parties Contractantes sur la côte du continent et les îles de l'Amérique nord-ouest, sera tracée ainsi qu'il suit:"

The line is then defined. It runs from an initial point, described as being situated in 54° 40′ north latitude, to the Arctic Ocean.

Article IV defines the boundary between the narrow strip of coast already referred to as allotted to Russia and the British possessions. The strip is described as—

"la lisière de côte mentionnée ci-dessus comme devant appartenir à la Russie."

Articles V and VI both distinguish between "côte" and "lisière."

Mr. Blaine agrees with Mr. Canning that Article VII of British Treaty is "practically a repetition" of Article IV of American Treaty.

Article VII closely corresponds with Article IV of the first Treaty, being, as Mr. Blaine says (here agreeing with Mr. Canning), "practically a repetition" of it. According to Contention (4.), the right given by both Articles to frequent harbours refers, not to the whole coast mentioned

British Case, Appendix, vol. iii. "United States No. 2 (1890)," p. 504.

in Article III, but to the "lisière." But the word used in Article VII is "côte," not "lisière;" and the effect of Contention (4.) is to destroy the reciprocal character of that Article.

Meaning of "north-west coast."

British Case, p. 66 *et seq.*

Recurring to the expression "north-west coast" or "north-west coast of America," it is rarely that the expression in either form is found as a geographical term, or that its precise signification is specially defined in words. One instance is the definition given by Greenhow, and quoted at p. 66 of the British Case, which corresponds precisely with the position maintained by Great Britain. The term is not often found on Maps, but a somewhat extended examination of these has resulted in the discovery of a few instances of its use, at dates both before and after that of the Treaty of 1825. From an inspection of these Maps, it is quite apparent that the expression was employed in a very lax and general sense, and without precision of meaning in respect to lines of latitude and longitude.

Greenhow's definition agrees with British construction.

Appendix, vol. i, pp. 105–109.

Moreover, the words "North-west coast of America" will be found in the following instances which have been used by Russia and the United States for the purpose of defining international relations under circumstances which make it evident that they were understood by the Contracting Parties as including the eastern coasts of Behring Sea.

Slave Trade Treaty of 1841

For instance, by Treaty of the 20th December, 1841, between Great Britain, Austria, France, Prussia, and Russia, for the suppression of the Slave Trade, it is provided (Article IV) that—

Hertslet's Commercial Treaties, vol. vi. p. 5.

"in no case shall the mutual right of search be exercised upon the ships of war of the High Contracting Parties."

Ibid., p. 19.

By section 8 of Annex (B) to that Treaty, "Instructions to Cruizers," this exemption is extended to vessels of the Russian-American Company, and such vessels are to have a Russian Patent, "which shall prove their origin and destination." The form of Patent, which is set out in Hertslet's Commercial Treaties, recites this section, and proceeds:—

Ibid., p. 956.

"Upon this ground the Administration of the Russian-American Company, being about to dispatch their ship named , built in the year of tonnage, and commanded by to the *North-Western coast* of America to the colonies

settled there, with the right to enter all ports and harbours, which necessity may require, considers it conformable to the above cited Article of the Instruction, that besides the patent authorizing the hoisting of the Russian flag by merchant-ships in general, the said vessel of the Company should be provided with this special patent to secure her against the visit of the cruizers of the Contracting Powers."

In this Treaty, "North-western Coast" includes coast of Behring Sea.

This is a document prepared by the Russian Government which, under the term "North-western coast," plainly includes the eastern coast of Behring Sea; for if not, it must have been intended that a vessel bound for the eastern coast of that sea was not to have a Patent, and was to be exposed by its Government to the risk of search, though the Treaty authorized its exemption.

Treaty of 1843.

The Treaty of the 11th January, 1843, between Great Britain and Russia (Article XII) says—

Hertslet's Commercial Treaties, vol. vi, p. 767.

"It is understood that, in regard to commerce and navigation in the Russian possessions on the *north-west coast* of America, the Convention concluded at St. Petersburgh, on the 16th (28th) February, 1825, continues in force."

The presumption is strong that "North-west coast" in 1843 meant exactly what "North-western coast" meant when used by Russia in 1841.

Treaty of 1859

The Treaty of the 12th January, 1859, between Great Britain and Russia (Article XIX) says—

Ibid., vol. x, p. 1063.

"In regard to commerce and navigation in the Russian possessions on the *North-West Coast* of America, the Convention concluded at St. Petersburgh on the 16th (28th) February, 1825, shall continue in force."

By Article XXII this Treaty lasts for ten years (therefore till after 1867).

British vessels navigated Behring Sea without hindrance throughout the Russian domination in Alaska.

It cannot be denied that subsequently to this Treaty (as well as before), and down to the year 1867 (the date of the cession of Alaska to the United States), vessels carrying the British flag were, without let or hindrance from Russia, navigating, fishing, and trading in the waters of Behring Sea

Further evidence that no distinction was drawn by the United States' Government between the coasts of Behring Sea and those of the rest of the Pacific is afforded by the Notice which is referred to at p. 59 of the United States' Case, and is printed in full in United States' Appendix, vol. i, p. 91. The Notice which was published on

United States' Case, p. 59. Appendix, vol. i, p. 91.

A Notice by the United States in 1845 assumes that the Treaty of 1824 includes the whole Russian-American coast north of latitude 54° 40′.

the 26th September, 1845, at the request of Russia by the United States' Government, is as follows:—

"The Russian Minister at Washington has informed the Secretary of State that the Imperial Government, desirous of affording official protection to the Russian territories in North America against the infractions of foreign vessels, has authorized cruizers to be established for this purpose along the coast by the Russian-American Company.

"It is, therefore, recommended to American vessels to be careful not to violate the existing Treaty between the two countries, by resorting to any point upon the Russian-American coast where there is a Russian establishment, without the permission of the Governor or Commander, nor to frequent the interior seas, gulfs, harbours, and creeks upon that coast at any point north of the latitude of 54° 40′."

It is clear that this Notice was not intended to apply only to so much of the Russian-American coast as lies between latitude 60° or latitude 59° 30′, or any other particular point, and latitude 54° 40′.

Its real object was to remind the subjects of the United States of the provisions of the Treaty of 1824 which restrained their right to visit places on the Russian-American coast where there were Russian establishments, without the permission of the Governor.

United States' Case, p. 53.

The Case of the United States further invites attention upon this point to—

Documents cited to show Russian assertions of control over Behring Sea, prove none, interpolations expunged.

"the express declarations of the Russian Government on the subject during the negotiations, and after the Treaties had been celebrated."

Two quotations are given in this connection from the correspondence of the Russian-American Company.

United States' Case, pp. 53, 54. (For revised translation, see Appendix, vol. i, p. 26.)

The sense of the first quotation from a letter from the Russian Minister of Finance to the Board of the Russian-American Company of the 18th July, 1822, is seriously altered by an interpolation:—

"The Rules to be proposed will probably imply that it is no longer necessary to prohibit the navigation of foreign vessels for the distance mentioned in the Edict of 4th September, 1821, and that we will not claim jurisdiction over coastwise waters beyond the limits accepted by any other Maritime Power [FOR THE WHOLE OF OUR COAST FACING THE OPEN OCEAN. OVER ALL INTERIOR WATERS, HOWEVER, AND OVER ALL WATERS INCLOSED BY RUSSIAN TERRITORY, SUCH AS THE SEA OF OKHOTSK,

BERING SEA, OR THE SEA OF KAMCHATKA, AS WELL AS IN ALL GULFS, BAYS, AND ESTUARIES WITHIN OUR POSSESSIONS, THE RIGHT TO THE STRICTEST CONTROL WILL ALWAYS BE MAINTAINED]."

By the introduction of the words "facing the open ocean," and the addition of the concluding sentence, a passage which completely supports the view of Her Britannic Majesty's Government, has become the foundation-stone upon which the contrary argument of the United States is based.

United States' Case, pp. 54, 55. (For revised translation, see Appendix, vol. i, p. 34.)

The second quotation in support of the United States' contention is taken from the Report of the Committee which considered the effect of the Treaty between Russia and the United States. This has been already dealt with at pp. 33–35; and it is only necessary here to repeat the opening sentence of the quotation with its interpolations:—

"Since the sovereignty of Russia over the shores of Siberia [AND AMERICA], as well as over the Aleutian Islands [AND THE INTERVENING SEAS], has long since been acknowledged by all Powers."

The passage read without the interpolations materially helps the British contention.

Conclusions.

From the facts and argument advanced in this chapter, it is submitted that it is established—

(*a.*) That the Conventions of 1824 and 1825 declared and recognized the rights of the subjects of Great Britain and the United States to navigate and fish in all parts of the non-territorial waters over which the Ukase purported to extend.

(*b.*) That the body of water now known as the Behring Sea was included in the phrase "Pacific Ocean," as used in the Treaty of 1825 between Great Britain and Russia; and

(*c.*) That the constructions placed on the term "North-west coast" or "North-west coast of America" in the Case of the United States are unsound.

CHAPTER IV.

HEAD (D).—*The User of the Waters in question from* 1821 *to* 1867.

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 40—

"The Pribiloff Islands, the home of the Alaskan seal herd, are situated less than 200 Italian miles from the Aleutian Chain on the south, and thus a sufficient portion of the eastern half of Bering Sea was covered by the Ukase to enable Russia to protect the herd while there."

(2.) United States' Case, p. 57—

"The burden is thus placed upon Great Britain to show that this jurisdiction, recognized in the year 1825 to exist, has been lost. It is not claimed that it was exercised for all purposes. Russia never sought to prevent vessels from passing through Bering Sea, in order to reach the Arctic Ocean; nor did she always strictly enforce the prohibition of whaling within the distance of 100 miles from its shores; but, so far as the fur-seals are concerned, it will be made to appear in what follows that the jurisdiction in question was always exercised for their protection."

(3.) United States' Case, p. 61—

"There is found positive confirmation that by the treaties of 1824 and 1825 Russia did not surrender her claim to exclusive control of trade, and especially of the fur industry, in Bering Sea, in the fact that the same control over the waters of that sea was enforced after the date of those treaties as before."

(4.) United States' Case, p. 69—

"Third. That after said treaty of 1825 the Russian Government continued to exercise exclusive jurisdiction over the whole of Bering Sea up to the time of the cession of Alaska to the United States, in as far as was necessary to preserve to the Russian-American Company the monopoly of the fur-seal industry, and to prohibit the taking on the land or in the water by any other persons or companies of the fur-seals resorting to the Pribiloff Islands.

"Fourth. That before and after the treaty of 1825, and up to the date of the cession of Alaska to the United States, British subjects and British vessels were prohibited from entering Bering Sea to hunt fur-seals, and that it does not appear that the British Government ever protested against the enforcement of this prohibition."

(5.) United States' Case, p. 73—

"It has also been seen that the great source of wealth of the Russian-American Company was the fur-seals of the Pribiloff Islands in Bering Sea, and that so jealously was this source of wealth guarded by the orders and authority of the Imperial Government that foreign vessels were prohibited from hunting seals in any part of Bering Sea, or in the passes of the Aleutian Islands; and that for the enforcement of this prohibition cruizers were employed in patrolling that sea so long as it remained Russian territory."

SUMMARY OF BRITISH REPLY.

The burden cannot lie on Great Britain of proving that a jurisdiction never acquired by Russia, or recognized by other nations, has been lost.

Russia showed no forbearance in not putting a stop to whaling. In 1846, her Foreign Minister wrote: "We have no right to exclude foreign ships from that part of the great ocean which separates the eastern shore of Siberia from the north-western shore of America."

By the Treaties, Russia did surrender her paper claim to the exclusive control of trade in Behring Sea. The Charters afterwards granted to the Russian-American Company, like that which had been granted in 1799, only purported to give this Company privileges to the exclusion of other Russian subjects. No Charter but that of 1821 affects to exclude foreigners.

The great source of that Company's wealth was not the fur-seal, which was formerly of less value than the otter.

There is no evidence of the exclusion of foreign ships from Behring Sea, or from seal hunting therein, and the only evidence adduced that Russia directed such an exclusion consists of the interpolations, now withdrawn, of a translator in contemporary documents.

Contention that Russia exercised jurisdiction in Behring Sea for protection of seals.

The above cited contentions on behalf of the United States, assert in effect that the jurisdiction of Russia over Behring Sea was consistently and specifically exercised for the protection of the fur-seal fishery; and that the object of the Russian Government in the alleged exclusion of Behring Sea from the effect of the Treaties of 1824 and 1825, was the protection of the fur industry.

United States' Case, p. 57.

Ibid., p. 59.

The British Case has already dealt with the alleged exercise of jurisdiction by Russia over Behring Sea, as a matter of fact, and as regards the alleged object of that jurisdiction, viz., the protection of the fur industry. Reference must be made to the documents mentioned in Chapter II of the British Case, where it is shown that the purpose of the Ukase of 1821 was to prevent illicit trading, and interference with the trade of the Russian-American Company; as well as to the facts fully set out in Chapter IV of the British Case, which show that, both before and after the date of the Treaties of 1824 and 1825, foreign vessels habitually frequented Behring Sea for the purpose of exploration, trading, and fishing.

British Case, p. 39.

The instructions sent out by the Russian Foreign Office in the year 1846, are alone sufficient to negative conclusively the present contention of the United States upon this point. Not only was the limit of 100 miles, which it had been endeavoured to establish by the Ukase, not enforced; but, as appears by the instructions,

Ibid., pp. 84, 85.

it was not contemplated to prohibit the approach of foreign vessels, or to interfere with them in any way, beyond the recognized limit of 3 miles from the shores.

United States' Case, pp. 39, 40.

It is further asserted, on behalf of the United States, that "the reason why the limit of 100 miles was chosen in 1821," was that this limit would "secure to the Russian-American Fur Company the monopoly of the very lucrative profit*" carried on by them. It is argued that, as the Pribyloff Islands are situated less than 200 Italian miles from the Aleutian chain on the south, a sufficient portion of the eastern half of Behring Sea was covered by the terms of the Ukase to enable Russia to protect the fur-seal fishery.

Ibid., p. 40.

Ibid., p. 41.

In 1822, the sea-otter was more important than the fur-seal.

It is true that in the conversation with the Governor-General of Siberia, quoted at p. 40 of the United States' Case, reference is made to the "very lucrative traffic" carried on by the Russian-American Fur Company; but it must be noted that the trade in fur-seal skins was not the sole, or even the most considerable, item in that traffic. The sea-otter was still the chief object of the hunters and traders at this date, and had continuously been so from the first. It commanded a far higher price in the market than any other skin. The traffic also included foxes, martens, beavers, bears, and other fur-bearing animals; while the fur-seal skins, though obtainable in large numbers, commanded only a small price.

Cook writes of the Russians met with by him in 1778:—

Cook's "Voyages," vol. ii, p. 509.

"Their great object is the sea-beaver or otter. I never hear them inquire after any other animal; though those, whose skins are of inferior value, are also made part of their cargoes."

Referring to a later date, contemporaneous with that of the Anglo-Russian Treaty, Bancroft writes:—

Alaska, History of, p. 538.

"In 1825 fur-seal skins were bartered in the Sandwich Islands by the captain of one of the Company's ships on the basis of 1 dol. 75 c. per skin. This seems an extravagant price, when, as will be remembered, the price at Kiakhta was only 5 to 7 roubles in scrip (1 dollar to

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* A misprint for "traffic." See United States' Case, Appendix, vol. i, p. 35.

1 dol. 40 c.); but it was the usual rate at which furs were exchanged at Novo Arkhangelsk with American and English skippers."

It thus appears that the quotation at p. 40 of the United States' Case does not support the inference which is sought to be drawn from it, that the limit of 100 miles was specially chosen for the protection of the fur-seals.

See *ante*, p. 57.

This limit, moreover, goes much further than was necessary if the protection of fur-seals had been the object of the Russian Government. The enforcement of the 100-mile limit would have absolutely precluded foreign vessels from navigating, for any purpose, in any part of Behring Strait, Behring Sea, the Sea of Okhotsk, and a large area of ocean south of the Aleutian Chain and along the coasts of both continents.

An attempt is made in the United States' Case, in one of the passages set out at the head of this Chapter, to explain the undoubted fact, relied upon by Great Britain, that no restraint was ever placed by Russia upon the free entrance of foreign vessels into Behring Sea for the purposes of navigation, and especially for the prosecution of the whale fishery.

United States' Case, p. 57.

It is plain that, in the absence of any public notification, the alleged special reservation in respect of fur-seals, (assuming that it ever had any existence in fact, or any legal validity,) never could have come to the knowledge of the seamen of various nations who from time to time visited these regions. Nor did Russia ever attempt to maintain in Behring Sea a naval force capable of giving effect to any such prohibition by force of arms.

Russia's alleged special reservation of fur-seal fishing, would not have been known to seamen.

No sufficient naval force in Behring Sea to give effect to the reservation

In the second place, attention is called to the fact that no evidence is forthcoming to support the alleged reservation of the exclusive right of sealing.

No evidence of reservation

It has already been shown, that, prior to the Treaty of 1825, Russia possessed no such sovereignty over the shores of Behring Sea as would enable her to exclude the vessels of other nations even from the coasts. Much less had she power to exclude vessels upon the high seas, either from navigating thereon, or from the exercise of any particular industry.

Neither in the negotiations nor in the Treaties

is there any reservation of a right to exclude foreigners from the particular pursuit of seal-fishing.

Whaling in Behring Sea largely developed after Treaties

Whaling, which was expressly forbidden by the Ukase, was admittedly carried on without restraint after the Treaties, and there is ample evidence of the large development of this industry.

British Case, p. 89.

Evidence on this matter has already been adduced in the British Case; but with further reference to the operations of whalers in years subsequent to 1840, the following passage may be quoted from an account of the fishery by Ivan Petroff. In discussing the condition of the Territory of Alaska prior to its cession to the United States, he writes :—

Quoted by A. H. Clark, in "Fisheries and Fishing Industries of the United States," vol. ii, pp. 205, 206.

"Under the terms of the Treaty with England and America no vessel of either of those two nations was allowed to hunt or fish within 3 marine leagues [*sic*] of the shore; but as there was no armed Government craft in the Colonies the provisions of the Treaty were totally disregarded by the whalers."

Referring to a later date, and writing in 1870, Dr. W. H. Dall makes the following remarks concerning certain forms of traffic carried on in and about Behring Sea :—

"Alaska and its Resources," p. 502.

"Since 1850, traders from the Sandwich Islands, have visited Kotzebue Sound and Grantley Harbour every spring. . . . . They load at Honolulu with ammunition, double-barrelled Belgian fowling-pieces, hardware, and rum or alcohol. They follow up the melting ice, and usually reach Bering Strait in the latter part of June. Their tariff of prices amounts to about 50 cents apiece for martens, in goods. They are usually provided with whaling implements, and manned by Kanakas. A single whale will pay the expenses of the voyage, and leave the profits of the trade clear."

That trading was going on within the limits of Behring Sea in the years immediately preceding and following 1821, has already been shown by the correspondence cited on pp. 20 and 21.

There is thus no evidence whatever of the existence, the enforcement, or the recognition by other nations of any restriction upon sealing.

Burden of proving loss of jurisdiction by Russia does not lie on Great Britain.

United States' Case, p. 57

It is emphatically denied that the burden lies on Great Britain of proving that Russia has lost her alleged jurisdiction in Behring Sea. The plain meaning of the Treaties indeed leaves no point to be proved; but, in any case, when a nation is contending for a jurisdiction

in excess of that which is admitted by international consent, the onus must rest with that nation of proving the existence of such jurisdiction by instances of its exercise, or of its recognition by other Powers. The claims of the United States cannot be supported merely by the negative fact that, for many years after the Ukase and the Treaties, there is no record of pelagic sealing in Behring Sea.

On this point, Lord Salisbury, in his despatch to Sir J. Pauncefote of the 2nd August, 1890, wrote in the following words :—

British Case, Appendix, vol. iii. "United States No. 2 (1890)." No 382, p. 519. See also British Case, p. 141.

"It is impossible to admit that a public right to fish, catch seals, or pursue any other lawful occupation on the high seas can be held to be abandoned by a nation from the mere fact that for a certain number of years it has not suited the subjects of that nation to exercise it."

Absence of sealing-vessels from Behring Sea was not due to Russian exclusion.

That the absence of sealing-vessels from Behring Sea was not due to any exclusion by Russia, is attested by the United States' Case itself; where it is shown that pelagic sealing was never attempted as a practical industry until after the cession of Alaska to the United States.

British Commissioners' Report, para. 100. United States' Case, p. 187.

It is clear, moreover, that the Russian Government, in 1846, took a different view of its rights from that now contended for by the United States. In that year, the Government was specially invited by the Governor-General of Eastern Siberia to enforce the prohibition of whaling within a distance of 40 miles of the shore. The reply of the Russian Government was, however, not that it preferred not to "strictly enforce" such right, but that no kind of right existed. The Foreign Office wrote :—

United States' Case, p. 57.

Russian Foreign Office says that it has no right to exclude foreign ships from Behring Sea.

"*We have no right to exclude foreign ships from that part of the great ocean* [illegible] *of Siberia from the north-western shore of America*, or to make the payment of a sum of money a condition to allowing them to take whales.' The Foreign Office were of opinion that the fixing of the line referred to above would reopen the discussions formerly carried on between England and France on the subject. The limit of a cannon-shot, that is about 3 Italian miles, would alone give rise to no dispute. The Foreign Office observed, in conclusion, that no Power had yet succeeded in limiting the freedom of fishing in open seas, and that such pretensions had never been recognized by the other Powers."

Tikmenieff, British Case, Appendix, vol. i, p. 41.

The instructions to cruizers with reference to whaling in Okhotsk Sea, quoted at p. 113 of the Case for Great Britain, are to the same effect.

British Case, p. 113.

Contention that Russia still exercised control in Behring Sea after Treaties.

It is stated on the part of the United States, in one of the passages placed at the head of this chapter—

United States' Case, p. 61.

"that by the treaties of 1824 and 1825 Russia did not surrender her claim to exclusive control of trade, and especially of the fur industry, in Bering Sea."

Positive confirmation of this assertion is stated to be found in the alleged circumstance that the same control over the waters of that sea was enforced after the date of the Treaties as before.

The evidence offered in support of this assertion consists of the Charters granted to the Russian-American Company in 1829 and 1842, and of extracts from the Company's records.

Ibid.

The Charter of 1829 is described in the United States' Case as a confirmation of the Charter of 1821, except in so far as it had been modified by the Treaties of 1824 and 1825.

The modifications here referred to are of great importance, and deserve most careful consideration.

Ibid., Appendix, vol. i, p. 16.

By Section 1 of the Rules attached to the Ukase of the 7th September, 1821—

British Case, Appendix, vol. i, p. 1.

"the pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports, and gulfs, including the whole of the north-west coast of America, beginning from Behring Straits to the 51st degree of northern latitude . . . is *exclusively granted to Russian subjects.*"

United States' Case, Appendix, vol. i, p. 25

By Article II of the Charter of the 13th September, 1821, the Emperor proceeded to grant to the Russian-American Company—

Russian-American Company's Charter of 1821 purports to exclude foreigners from competing with Company.

"the privilege of hunting and fishing, *to the exclusion of all other Russian or foreign subjects* throughout the territories long since in the possession of Russia on the coasts of North-west America, beginning at the northern point of the Island of Vancouver, in latitude 51° north, and extending to Bering Strait and beyond. . . ."

United States' Case, Appendix, vol. i, p. 25.

In Article VI of the Charter it is further set forth that—

"In order that the Company may enjoy the exclusive rights bestowed upon it, and to prevent in the future any molestation or disturbance on the part of *Russian subjects or foreigners*, rules and regulations have been established," &c.

It is obvious that the language of this Charter, and the change from that employed in the Ukase

of 1799, was consequent upon the language used in the Ukase of 1821; by which, for the first time, as has been repeatedly pointed out, Russia attempted to exclude the subjects of foreign nations from the whole of the area therein referred to.

In the first Charter granted subsequently to the Treaties of 1824 and 1825, viz., that of the 29th March, 1829, there is a striking change in the language used.

But Charter of 1829 only purports to exclude other Russian subjects.

Articles 2 and 3 of this Charter are as follows:—

United States' Case, Appendix, vol. i, p. 28.

"(2.) The limits of navigation and industry of the Company are determined by the Treaties concluded with the United States of America April 5 (17), 1824, and with England February 16 (28), 1825.

"3.) In all the places allotted to Russia by these treaties there shall be reserved to the Company the right to profit by all the fur and fish industries, *to the exclusion of all other Russian subjects.*"

If the Russian Government had considered itself entitled, in spite of the Treaties, to close Behring Sea to the approach of foreigners, it is inconceivable that the Charters should not have been so worded as to reserve the waters and coast of Behring Sea, while opening to foreigners the waters and coasts to the southward of that sea.

If this distinction was to be drawn at any time, it must of necessity have been drawn upon this occasion, and the omission to do so becomes more significant when the Charters of 1829 and 1844 are read in connection with the protests of the Russian-American Company against the terms of the Treaties, and with the proceedings of the Committee which investigated those complaints in 1824.

Ibid., p. 68.

The Charter of 1844 is equally significant.

Ibid., p. 28.

Section 2 sets out the boundary-line which was described by the Treaty of 1825 between Great Britain and Russia.

Section 3 is in the following terms:—

"SEC. 3. In all places annexed to Russia by the above-mentioned delimitation there is granted to the Company the right to carry on the fur and fishing industries *to the exclusion of all Russian subjects.*"

Company's Charter of 1844 only purports to exclude other Russian subjects

Ibid., p. 29

The above extracts show conclusively that, after the Treaties which resulted from the negotiations upon the question of the Ukase of 1821, the claim to exclude foreigners from navigating, hunting, and fishing, asserted by Russia in that

Ukase, was definitely abandoned and never revived. The reference to foreigners disappeared from the Charter of the Company.

It is further to be noted that the limits of the Company's territories are clearly defined in each of the three Charters quoted above; and though they are not described in identical terms in each Charter, the coast-line which is granted includes in each case the whole Russian shore from the Arctic Ocean to the southernmost limit.

United States' Case, pp. 68, 69.

Further quotations are made at pp. 68 and 69 of the United States' Case, as to all of which it may be remarked that the documents quoted are of a purely municipal character, affecting Russian subjects only.

Two points, however, deserve more detailed notice:—

Proposals for renewal of Company's Charter in 1865 and 1866 do not suggest exclusion of foreigners.

1. In the proposals for the renewal of the Company's Charter in 1865 and 1866, there is no suggestion that powers should be granted to exclude foreigners, such as had been granted by the Charter of 1821, and subsequently abandoned in the Charters of 1829 and 1844.

Ibid., p. 68.
United States' Case, Appendix, vol. i, p. 75.

2. The letter of the Minister of Finance, dated the 19th June, 1865, affords further confirmation of the fact that the Russian Government was unaware of the existence of any such special jurisdiction over the waters of Behring Sea as is now claimed by the United States as the successors of that Government.

Exclusive privileges to be granted to Company only relate to land (not sea).

The Minister proposed, in paragraph 15, to reserve to the Company the exclusive right of engaging in the fur-trade as defined within the following limits:—

"On the peninsula of Alaska, reckoning as its northern limit a line drawn from Cape Douglass, in Kenia Bay, to the head of Lake Imianna; on all the islands lying along the coast of that peninsula; on the Aleutian, Commander, and Kurile Islands and those lying in Behring's Sea, and also along the whole western* coast of Behring's Sea.

Revocation of privileges on eastern coast of Behring Sea

But to revoke—

Revised translation, Appendix, vol. i, p. 42.

"in the district to the north-east off the peninsula;†

* The foot-note, United States' Appendix, vol. i, p. 77, is obviously erroneous. The passage as it stands deals, in due course, with *all* the shores of the Russian possessions. But the proposed substitution of "eastern" for "western" involves the omission of all reference to the Asiatic shores, and renders meaningless the subsequent words "on land to the northern extremity of the American Continent."

† The exact translation of the Russian text is "from."

Alaska along the whole coast to the boundary of the British possessions, also on the islands lying along this coast, including in that number Sitka and the whole Kolosbian archipelago, *and also, on land, to the northern extremity of the American Continent*, the privilege granted to the Company of the exclusive prosecution of the said industry and traffic."

This is described in the United States' Case as a decision—

"to extend the Company's privileges only to the region about Bering Sea." United States' Case, p. 68.

It is supposed, apparently, that it contains evidence of the exercise of the extraordinary jurisdiction over Behring Sea which is claimed in the United States' Case; but, in fact, it furnishes evidence to the contrary, and can only be made to bear the construction thus placed upon it by an unfounded suggestion that, when the writer mentioned the western shore, he meant to refer to the eastern. The accuracy of expression of the passage, as it stands, becomes clearly apparent on following its description with the aid of a Map.

The proposed Charter would have put the coasts south of Behring Sea on the same footing as those of Behring Sea itself.

The passage shows that, so far from asserting exclusive rights "*to the region about Behring Sea*," the writer actually proposed to abolish the exclusive privilege of the Company upon the eastern shores of that sea, and treated those coasts and the coasts of the Pacific to the eastward and southward of the Alaskan Peninsula, including Sitka, as subject in precisely the same manner and to the same extent to the jurisdiction of Russia.

British Case, pp. 79-83.

The correspondence in respect to the "Loriot" further shows that in the year 1837 the United States maintained, in accordance with the present contention of Her Majesty's Government, that the 1st Article of the Treaty of 1824 was in itself sufficient to entitle the subjects of the United States "to fish in these seas, and to resort to the coast for the prosecution of their lawful commerce upon points not already occupied." It was moreover claimed on the part of the United States that such rights applied to "any part of the unoccupied coast of North America"; and though the North-west coast is several times mentioned, it is not in any way defined or restricted to any special meaning, but obviously includes the whole coast of the continent to the

Ibid., p. 80.

Ibid., p. 61.

north of latitude 54° 40′. It is a matter of history that, in the years immediately succeeding the "Loriot" incident, and subsequently, the vessels of various nations, but more particularly those of the United States, began to resort to and frequent the shores of the Aleutian Islands and the continental shores of Behring Sea, so soon as the exigencies of the whale fishery rendered it convenient for them so to do.

United States' Case, pp. 66–67.

The remainder of the evidence upon which the Case for the United States depends, in respect of the period now under discussion, consists of extracts from the correspondence of the Russian-American Company.

Except in interpolations, letters of Russian-American Company do not express even the intention to exercise maritime control.

For example, at p. 61, the following passage from a letter, dated the 18th August, 1824, written by Count Nesselrode to the Minister of Finance, is quoted:—

United States' Case, p. 61. (For revised translation, see Appendix, vol. i, p. 32.)

". . . it is His Majesty's firm determination to protect the Company's interests [IN THE CATCH AND PRESERVATION OF ALL MARINE ANIMALS, AND TO SECURE TO IT ALL THE ADVANTAGES TO WHICH IT IS ENTITLED UNDER THE CHARTER AND PRIVILEGES]."

It is now admitted that the words within brackets are interpolated.

No comment is required upon the extract above quoted, as the interpolated passage has been withdrawn; but when the original letter is examined, it will be found that it had no relation whatever to the protection of seals at sea, but related entirely to the taking of seals on the Islands of St. Paul and St. George, and the Commander Islands; and it has, therefore, no bearing upon the present argument.

Ibid., pp. 62–66. (For revised translation, see Appendix, vol. i, p. 39.)

The letter of the Board, dated the 20th March 1853, from which several quotations are made at pp. 62-66 of the United States' Case, deserves more attention.

The first quotation is as follows:—

"The board of Administration respectfully requests that, in case the interests of the Company require a deviation from our plans, your Excellency will never lose sight of the fact [THAT THE INTERESTS OF THE COMPANY ARE CENTERED AT THE PRESENT TIME IN THE DISTRICT SURROUNDING THE SEAL ISLANDS OF THE PRIBYLOF AND COMMANDER GROUPS, AND] that consequently the colonial waters

must be visited by the Company's cruizers constantly and in every part, in order to watch *and warn* the foreign *whalers*."

This is twice quoted in the United States' Case, and special attention is directed to it at p. 63, as a communication which—

United States' Case, pp. 62, 66.

"throws much light upon the commercial activity of the Russian-American Company, and may be accepted as indicative of the methods by which, during the last term of its charter, it enforced its control, in the colonial waters. . . ."

The value of this passage for the purpose for which it is quoted is, however, entirely destroyed by the discovery that the words which have been here printed within brackets are mere interpolations in the text of the despatch, and do not exist in the original Russian.

The second passage is as follows:—

["THIS AGENT MUST OBSERVE AND KEEP A RECORD OF ALL FOREIGN SHIPS SEEN DURING THE VOYAGE, AND OF THE POSITION OF THE SAME WHEN OBSERVED, FOR THE INFORMATION OF COMMANDERS OF OUR ARMED CRUIZERS AND OF THE COLONIAL AUTHORITIES IN SITKA, KAMCHATKA, AND AYAN."]

Ibid., p. 63. (For revised translation, see Appendix, vol. i, p. 37.)

No part of this passage is to be found in the original Russian.

The third quotation is of greater length than the others, and refers to what is termed in the United States' Case a "protective scheme." The inaccuracies of the translation of this passage are too numerous to be here noticed, but may be seen at once by a comparison with the literal translation in the Appendix to this Counter-Case.

United States' Case, pp. 64–66

Appendix, vol. i, pp. 38, 39.

Throughout this despatch, when correctly translated, there is no mention whatever of the protection of the fur-seals. It is true that instructions are given to watch until—

"the foreign whalers leave Behring Sea, viz., the last part of August or the beginning of September,"

Ibid., p. 38, paragraph 3. See also last paragraph of despatch.

but the only indication given as to the object of such watching is to be found in the following words:—

"To keep watch over the foreign whalers and the Englishmen, with regard to the trade carried on by them with our savages."

Ibid., p. 30 paragraph 5

But even if the preservation of fur-seals or fur-seal fisheries had been specially mentioned as the object of these instructions, it is denied that they could have any weight as evidence for the purpose for which they are quoted in the United States' Case, unless it could be shown that they were acted upon in practice by the expulsion of a foreign ship. Of this, however, no evidence is offered, and it is confidently asserted that no such evidence exists.

No evidence is offered that any foreign ship was expelled by Russia.

United States' Case, p. 67. (For revised translation, see Appendix, vol. i, p. 41.)

At p. 67 of the United States' Case, the following extract is quoted from the letter from the Chief Manager of the Russian Colonies to Benzeman, dated 20th June, 1861 :—

> "9. It has come to my knowledge that in the present year two whaling-vessels have sailed from San Francisco for the purpose of trading on the Pribilof Islands [OR OF HUNTING IN THEIR VICINITY.] Consequently, I would suggest that during your presence in those waters you will exercise the duties of an armed cruiser, [TO PREVENT ANY UNLAWFUL ACTS ON THE PART NOT ONLY OF THESE TWO VESSELS, BUT OF ANY OTHERS WHICH YOU MAY FIND IN BERING SEA]."

It will be seen that the passages printed in brackets are not to be found in the original Russian, while the "instructions herewith inclosed, which have been approved by the Emperor" (see paragraph 9, revised translation), have not been produced by the United States, although they are essential to the correct appreciation of the despatch in which they were inclosed.

United States' Case, p. 67. (For revised translation, see Appendix, vol. i, p. 43.)

The Proclamation issued at Sitka in 1861 is similarly made to serve as evidence in the United States' Case, by the insertion of the words "*or waters*." No such words occur in the original, which is merely a notice to quit Russian *territory*.

Conclusions

From the considerations referred to in this Chapter, it is submitted that the conclusions claimed to have been established in the British Case, as stated at p. 90, are fully supported; and that the further evidence which has been adduced clearly shows that, with the growth of commerce and increase of trade subsequently to

the year 1821, vessels of nations other than Russia without let or hindrance frequented, traded, and fished in the waters of Behring Sea; and that no attempt was ever made during the whole period to restrict the use of those waters to vessels carrying the Russian flag.

CHAPTER V.

HEAD (E).—*What Rights passed to the United States under the Treaty of Cession of the 30th March, 1867?*

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 70—

"This treaty, which, prior to its final consummation, had been discussed in the Senate of the United States and by the press, was an assertion by two great nations that Russia had heretofore claimed the ownership of Bering Sea, and that she had now ceded a portion of it to the United States; and to this assertion no objection is ever known to have been made."

(2.) United States' Case, p. 74—

"Their value [the fur-seals] was well known to the American negotiators of the treaty of 1867, and while it must be admitted that political considerations entered into the negotiations to a certain extent, yet so far as revenue to the Government and immediate profit to its people were concerned, it will appear from a careful study of the incidents attending the transfer of sovereignty that it was the fur industry more than all other considerations which decided the United States to pay the sum of 7,200,000 dollars required by Russia for the cession and transfer of her sovereign rights and property."

(3.) United States' Case, p. 85—

"The understanding which existed in the United States, at the time of the purchase and cession of Alaska, as to the scope and effect of the jurisdiction exercised by Russia over the waters of Bering Sea, and the enhanced value which was thereby placed upon the fur-seal herd of the Pribiloff Islands."

SUMMARY OF BRITISH REPLY.

The Treaty of 1867 only assigns territory, not sea.

The value of the fur-seal herd was not taken into account in the purchase by the United States.

Contention that Treaty of 1867 was assertion of ownership of Behring Sea.

United States' Case, p. 70.

British Case, pp. 91–102.

With reference to the contention first quoted above, it is to be observed that neither the Treaty of 1867, nor any other document published or communicated to foreign nations in connection therewith, asserted any claim to the ownership of Behring Sea. Upon this point, attention is invited to the observations contained in Chapter V of the British Case.

The extracts from the debates in Congress, and the negotiations which took place prior to the completion of the Treaty, show conclusively that it was not supposed by the advisers of the United States, or by any person on their behalf, that any exclusive dominion over Behring Sea was being acquired.

Reports of Committees of Congress.

At pp. 75 and 76 of the United States' Case reference is made to the Report of a Committee of Congress, and copious quotations are made therefrom. This Report, however, is not one made at or about the time of the Treaty, or the acquisition of Alaska, but is that of a Committee of Congress which sat in the year 1889 after the present controversy had arisen.

No reference is made in the United States' Case to the report of any previous Committee of Congress. Such reports, however, exist, and are of a directly opposite tendency. There is, for example, the Report mentioned in Bancroft's "History of Alaska" (p. 595), in the following terms:—

Foreign Affairs Committee, in 1868 states objects of purchase from Russia, without even mentioning the acquisition of Behring Sea.

"The motives which led the United States' Government to purchase them" [Russia's American possessions] "are thus stated in a report of the committee on foreign affairs published 18th May, 1868: 'They were, first, the laudable desire of citizens of the Pacific coast to share in the prolific fisheries of the oceans, seas, bays, and rivers of the Western World; the refusal of Russia to renew the Charter of the Russian-American Fur Company in 1866; the friendship of Russia for the United States; the necessity of preventing the transfer, by any possible chance, of the north-west coast of America to an unfriendly Power; the creation of new industrial interests on the Pacific necessary to the supremacy of our empire on the sea and land; and finally, to facilitate and secure the advantages of an unlimited American commerce with the friendly Powers of Japan and China.'" Alaska, p. 595.

Again, the Committee of Ways and Means, to which, in 1876, was referred a Resolution of the House of Representatives, directing an investigation into certain matters relating to the lease by the United States' Government to the Alaska Commercial Company, presented a Report, from which the following is an extract:—

"When the proposition to purchase the Alaska Territory from Russia was before Congress, the opposition to it was very much based on alleged barrenness and worthlessness of the territory to be acquired. It was supposed that though there might be many political reasons for this H. R., Ex. Doc., 44th Cong., 1st Sess., No. 623, p. 12.

A Committee, in 1876, says that seal islands were not considered in purchase.

addition to the American Pacific possessions, there were not commercial or revenue advantages. *The value of those seal islands was not considered at all. Russia had derived but little revenue from them, indeed a sum not sufficient to pay the contingent expenses of maintaining the official authority.* Under our system, however, we have a very different result."

United States' 10th Census Report, 1881.

Mr. H. W. Elliott, in his official Report on the seal islands of Alaska, writes as follows upon this point:—

Mr. H. W. Elliott, in 1881, reports that the value of the fur-seal industry was not taken into account in the purchase from Russia

"The Seal Islands of Alaska," by Henry W. Elliott, Washington, Government Printing Office, 1881, pp. 58, 69.

"STRANGE IGNORANCE OF THEIR VALUE IN 1867.—Considering that this return" [that accruing from the fur-seal industry] "is the only one made to the Government by Alaska, since its transfer, *and that it was never taken into account, at first, by the most ardent advocates of the purchase of Russian-America*, it is in itself highly creditable and interesting; to Senator Sumner the friends of the acquisition of this territory in 1867, delegated the task of making the principal argument in its favour. Everything that was written in strange tongues was carefully translated for the choice bits of mention which could be found of Alaska's value. Hence his speech on the subject possesses this interest.* It is the embodiment of everything that could be scraped together, having the faintest shadow of authenticity, by all of the eager friends of the purchase, which gave the least idea of any valuable natural resources in Alaska; *therefore, when, in summing all this up, he makes no reference whatever to the seal islands, or the fur-seal itself, the extraordinary ignorance at home and abroad relative to the Pribylov Islands can be well appreciated.*"

British Case, Appendix, vol. i, p. 81.

The above refers especially to Mr. Sumner's concluding summary. Mr. Sumner did, in fact, make a reference to the fur-seal in the body of his oration, though in a single paragraph only of his long speech; but the perusal of that speech, and the absence of any mention of the fur-seal in his recapitulation of principal points, show the relatively small importance which he attached to the fur-seal fishery.

In the same Report Mr. Elliott also writes:—

"Seal Islands of Alaska," p. 25.

"It will be remembered by many people, that when we were ratifying the negotiation between our Government and that of Russia, it was made painfully apparent that nobody in this country knew anything about the subject of Russian-America. Every schoolboy knew where it was located, but no professor or merchant, however wise or shrewd, knew what was in it. Accordingly, immediately after the purchase was made and the formal transfer

* Speech on cession of Russian-America, United States' Senate 1867, "Summary," p. 48.

affected, a large number of energetic and speculative men, some coming from New England even, but most of them residents of the Pacific coast, turned their attention to Alaska. They went up to Sitka in a little fleet of sail- and steam-vessels, but among their number it appears there were only two of our citizens who knew of, or had the faintest appreciation as to the value of the seal islands. One of these, Mr. H. M. Hutchinson, a native of New Hampshire, and the other a Captain Ebenezer Morgan, a native of Connecticut, turned their faces in 1868 toward them. Mr. Hutchinson gathered his information at Sitka. Captain Morgan had gained his years before by experience on the South Sea sealing-grounds."

Professor W. H. Dall also, who visited the islands in 1868, is quoted on another page of the United States' Case, as follows:—

"During my visit to St. George Island in 1868, this vast territory of Alaska had just fallen into the possession of the United States, and the Government had not yet fairly established more than a beginning of an organization for its management, as a whole, *without mentioning such details as the Pribiloff Islands.*"

United States' Case, p. 132. Appendix, vol. ii, p. 23.

Mr. Elliott has since repeated the opinion expressed in the above-quoted Report, in the evidence which he gave to the Committee whose Report is quoted at p. 75 of the United States' Case:—

"The Russians made no effort to hold these islands, at the time of the transfer, simply because they did not then value their sealing industry—it was of small consequence then—a skin only being worth from 3 to 4 dollars in London.

"They failed to properly develop the market, as the lessees have done under our Government."

Mr. Elliott also testifies that *Russia* did not value the sealing industry.

50th Cong., 2nd Sess., H. R, Report No. 3883, p. 139.

Mr. C. A. Williams, in his evidence, given before a Committee of Congress, said:—

"I do not think, when the Government made the purchase from Russia, that any one outside of a dozen people, perhaps, who had been acquainted with sealing heretofore, had the slightest knowledge of their being any value in those islands, or that the Government was going to get anything of value outside the mainland of Alaska."

Mr. Williams does not think that more than a dozen people knew that the purchase contained anything of value outside the mainland.

50th Cong., 2nd Sess., H. R, Report No. 3883, p. 88.

Dr. W. H. Dall, who is specially quoted as an authority on Alaska in the United States' Case, wrote a letter to correct certain statements attributed to him in the discussion arising from a paper by Mr. W. Palmer, read before the Biological Society at Washington. In this letter Dr. Dall says:—

"Forest and Stream," November 5, 1891.

Dr. Dall mentions small value of seal-skins in 1866, as reason why little stress would have been laid on the acquisition of the seals by the United States.

"I said that in 1866 (not 'in the early days of the industry') I purchased first-class fur-seal skins at 12½ cents a-piece, that being the price at which they were sold by the Russians. The point of this observation lies in its application to the oft-repeated statement that, as Mr. Palmer says, 'little stress was laid upon the fact that fur-seals were found in abundance' at the time of the purchase of the Territory by the United States. No stress could reasonably have been laid upon it, since 100,000 seals would at that time have been worth only some 12,500 dollars, which would hardly have paid for the trouble of taking them. Of course, almost immediately afterwards this was no longer true."

Conclusions.

It is submitted that the contentions of the United States are based upon two assumptions, both of which are entirely erroneous.

The first, that, prior to the year 1867, Russia had, in fact, excluded the vessels of other nations from Behring Sea.

The second, that the language of the Treaty of 1867 describes, and purports to convey, some special rights in the non-territorial waters of Behring Sea.

As to the first, the considerations contained in the preceeding Chapters have established that, prior to 1867, Russia had not, at any time, excluded from Behring Sea the vessels of foreign nations.

As to the second, a reference to the language of the Treaty—which is set out at pp. 91 to 94 of the British Case—shows that Russia was conveying territories which were then admitted to form part of the Russian Empire, but with no more than the ordinary territorial rights.

CHAPTER VI.

Point 5 of Article VI.—*Has the United States any Right, and if so, what Right of Protection or Property in the Fur-seals frequenting the Islands of the United States in Behring Sea, when such seals are found outside the ordinary 3-mile limit?*

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 57—

"By the Ukase of 1821 Russia had publicly claimed certain unusual jurisdiction both over Behring Sea and over a portion of the Pacific Ocean. . . . . Russia never sought to prevent vessels from passing through Bering Sea in order to reach the Arctic Ocean; nor did she always strictly enforce the prohibition of whaling within the distance of 100 miles from its shores; but, so far as the fur-seals are concerned, it will be made to appear in what follows that the jurisdiction in question was always exercised for their protection."

(2.) United States' Case, p. 85—

"In determining what right of protection or property this Government has in the fur-seals frequenting the islands of the United States in Bering Sea when such seals are found outside of the ordinary 3-mile limit, it is not compelled, neither does it intend, to rest its case altogether upon the jurisdiction over Bering Sea established or exercised by Russia prior and up to the time of the cession of Alaska. It asserts that, quite independently of this jurisdiction, it has a right of protection and property in the fur-seals frequenting the Pribiloff Islands when found outside the ordinary 3-mile limit, and it bases this right upon the established principles of the common and the civil law, upon the practice of nations, upon the laws of natural history, and upon the common interests of mankind."

(3.) United States' Case, pp. 231, 232—

"It may be laid down as a principle, established by international usage, that any nation which has a peculiar interest in the continued existence of any valuable marine product, located in the high seas adjacent to its coasts or territorial waters, may adopt such measures as are essential to the preservation of the species, without limitation as to the distance from land at which such necessary measures may be enforced."

(4.) United States' Case, p. 237—

"This hasty review of the legislation of near a score of nations clearly establishes the principle announced that any nation, having a peculiar interest in the continued existence of animal life on the high seas, adjacent to its coasts or territorial waters, may adopt such measures as are essential to its preservation, without limit as to the distance from land at which such measures may be enforced."

(5.) United States' Case, pp. 295, 296—

"The United States, upon the evidence herewith submitted and referred to, claim that the following propositions of fact have been fully established: . . . . . That at all times, when in the water, the identity of each individual can be established with certainty, and that at all times, whether during its short excursions from the islands in search of food or its longer winter migration, it has a fixed intention, or instinct, which induces it to return thereto."

(6.) United States' Case, pp. 299, 300—

"The United States' Government will claim: First. That in view of the facts and circumstances established by the evidence, it has such a property in the Alaskan seal herd . . . . . as entitles it to preserve the herd from destruction, in the manner complained of, by an employment of such reasonable force as may be necessary. Second. That, irrespective of the distinct right of property in the seal herd, the United States' Government has for itself, and for its people, an interest, an industry, and a commerce; . . . . and that no part of the high sea is, or ought to be, open to individuals for the purpose of accomplishing the destruction of national interests of such a character and importance."

SUMMARY OF BRITISH REPLY.

The right of protection mentioned in Point 5 of Article VI is now alleged to be exercisable in every part of the high sea, and is claimed by the United States on general principles, which, if sound, gave a like right to Russia. Such right is said to be independent of any jurisdiction alleged to have been formerly exercised by Russia in Behring Sea, by virtue of a prescriptive title. But acts of protection by Russia, had there been such, could in no way be attributed to a jurisdiction founded on prescriptive title, or used as evidence of such title, if they would have been equally justifiable without it.

The United States can have no right of protection in seas where it has no jurisdiction. For, on the unappropriated sea, all nations are equal and independent, and cannot interfere with each other's ships, except for piracy.

The Treaty, rightly construed, does not give power to the Tribunal to decide whether the United States have jurisdiction, for any purpose, over waters outside that part of Behring Sea where the United States claim exclusive jurisdiction. No claim to jurisdiction of any kind, beyond that limited area, had been made before the Treaty was signed; and it refers no questions to arbitration, except such as had then arisen between the Contracting Powers.

The words in which the grounds of claim to this widely-extended right of protection are stated, are difficult of interpretation. The "common law" referred to cannot be that of England, which has no force in a dispute between nations. "Civil law," whether denoting Roman law, or used in opposition to criminal law, is inappropriate here. The right claimed must depend on international law, of which "the practice of nations" can only afford evidence, and which recognizes all the "interests of mankind" of which the Tribunal can take cognizance in dealing with rights as distinguished from regulations.

One of the purposes of the ordinary 3-mile limit is that of exclusive fishing.

There can be no property in free-swimming seals, which are proved in Chapter VII to be *feræ naturæ*, and are, therefore, *res nullius* even by the law of the United States. Still less is the property vested in the United States' Government; and their lessees neither have nor claim any interest in these animals.

If the identification of each seal and its annual return to the Pribyloff Islands, be assumed as facts, they show no title without proof that the seal was tame or reclaimed before its departure; and that it intended to return, not only to the islands but to some spot where it would be under the care and control of its owner.

The laws of seven British Colonies, of Scotland, Ireland, and ten other countries (including Russia), are quoted or referred to in the United States' Case, apparently for the purpose of supporting the alleged right of protection. But in no instance is it shown that ex-territorial jurisdiction over foreigners is asserted or exercised.

The protection spoken of in the Contention is a protection as of right.

In the question now to be discussed, and in the contentions of the United States above quoted, the protection spoken of, whether expressly or impliedly, is a protection as of right; it is in no way dependent on the exercise by the Arbitrators of the power of making Regulations given them, in a certain event, by the Treaty of the 29th February, 1892. If, for the sake of brevity, the passages in which the contentions occur are not, in every instance, set out at sufficient length to show that the claim is one of right, a perusal of the context, or a reference to their place in the argument, will make it abundantly clear.

Distinction between right of protection and property.

Right of protection is quite distinct from property, and when involving, as is suggested in the United States' Case, the adoption of "necessary measures" (Contention 3), and the employment of "reasonable force" (Contention 6), implies jurisdiction over the waters to which the right extends. Jurisdiction may exist without property, and property without jurisdiction. Thus, in territorial waters, every nation has a jurisdiction, which justifies the exclusion of foreigners from fishing; yet, by the law of both Great Britain and the United States, a fish swimming at large in such waters is not the subject of property.

Right of protection claimed, independent of the jurisdiction over Behring Sea alleged to have been acquired from Russia.

It will be observed that, by the second of the contentions set forth at the head of this Chapter, a right of protection over the fur-seals (*i.e.* a jurisdiction entitling the United States to protect them) is claimed independently of the jurisdiction over Behring Sea, described in Contention (1.) as an "unusual jurisdiction," which is alleged to have been exercised by Russia, and transferred to the United States in 1867. Further, by Contention (6.), "no part of the high sea" is excepted from this right of protection. But if it be true, as propounded in Contentions (2.) and (6.), when read together, that, on general principles, nations having "an interest, an industry, and a commerce" in fur-seals, have a right to protect those animals, exercisable over the high seas generally, then acts by Russia, had there been such, justifiable by virtue of such a right, would afford no evidence whatever of the "unusual jurisdiction" over one portion of those seas, alleged to have been exercised by Russia. In fact, the two arguments are mutually destructive. If the right attached to Russia by virtue of

No part of the high sea excepted from the right of protection.

Acts of protection, had there been such, would afford no evidence of Russian jurisdiction over Behring Sea.

her interest in the fur-seals, its exercise would afford no evidence of any title to an unusual jurisdiction. Yet, in Contention (1.), the allegation that Russia exercised jurisdiction for the protection of fur-seals, is relied on as the main proof of her prescriptive title to Behring Sea, and of the unusual jurisdiction arising from that title. That Behring Sea was used as a passage to the Arctic Ocean, is there expressly admitted; that the prohibition against whaling within 100 miles from the shore was not strictly enforced, is also there admitted; nor is one instance of its enforcement even alleged: but it is said, that "so far as the fur-seals are concerned," the unusual jurisdiction was always exercised.

There can be no right of protection in [illegible] where there is no jurisdiction.

That right of protection implies jurisdiction over the waters where it is to be exercised, is clear from the following propositions:—

(1.) That, on the unappropriated sea, all nations are equal, and independent of one another;

(2.) That, in time of peace, a vessel thereon cannot be forcibly interfered with by a foreign Power, except for piracy; and

(3.) That fishing is not piracy.

The last of these propositions is too elementary to need support. The other two, if authority be supposed necessary, are illustrated by Lord Stowell's Judgment in the case of "Le Louis," already cited upon another point in the British Case, p. 154, in which it was held that a French ship could not be condemned as a pirate for being employed in the Slave Trade, and forcibly resisting the search of the British cruizers. In that case, Lord Stowell said:—

Dodson's Admiralty Cases, vol. ii, p. 210.

Ibid., p. 243

"Upon the first question, whether the right of [illegible] exists in time of peace, [illegible]

subjects, has a right to assume or exercise authority over the subjects of another. . . . . The right of visitation being in this present case exercised in time of peace, the question arises, how it is to be legalized? And looking to what I have described as the known existing law of nations evidenced by all authority and all practice, it must be upon the ground that the captured vessel is to be taken *legally** as a pirate, or else some new ground is to be assumed on which this right which has been distinctly admitted not to exist generally in time of peace can be supported. . . . The question then comes to this:—Can the occupation of *this French** vessel be legally deemed a piracy, inferring, as it must do, if it be so, all the pains and penalties of piracy? . . . . In truth it wants some of the distinguishing features of that offence. It is not the act of free-booters, enemies of all [illegible] men, renouncing every country, and [illegible] every country, [illegible] its coasts and vessels indiscriminately, and [illegible] an universal terror and alarm. . . . Be the malignity of the practice what it may, it is not [illegible] in legal consideration.

Dodson's Admiralty Cases, vol. ii, p. 246.

Ibid., p. 247.

Ibid., p. 248.

Her Majesty's Government respectfully protest that the question whether the United States have any jurisdiction outside Behring Sea—or, to speak more strictly, outside that part of Behring Sea in which the United States claim exclusive jurisdiction—is not referred to this high Tribunal by the terms of the Treaty of 1892.

[illegible] Majesty's Government [illegible] claim [illegible] within [illegible]

When the question stated at the head of this chapter speaks of a right of protection beyond the ordinary 3-mile limit, it is assumed that the part of Behring Sea in which exclusive jurisdiction is claimed is the only area with which the two Powers are concerned. For, previously to the Treaty of 1892, no claim of jurisdiction, exclusive or otherwise, beyond the limits of Behring Sea, had been made by the United States. The preamble and the 1st Article both express what, it is submitted, would in any case be implied, that "the questions which *have* arisen" are those which are referred.

The Treaty [illegible] which had [illegible] claim [illegible] beyond [illegible]

The claim made by the United States is set forth in Mr. Blaine's despatch of the 17th December, 1890. There, Question 5 is proposed in the following form:

United States' Case, Appendix vol. i, p. 286.

What are now the rights of the United States [illegible] the exclusive fisheries in the waters of the Behring Sea outside of the ordinary territorial limits, which rights grow out of the occupation by Russia [illegible] exclusive right of jurisdiction [illegible]

* The *italics* are mine throughout.

the waters of Behring Sea, or out of the ownership of the breeding-islands and the habits of the seals in resorting thither and rearing their young thereon, and going out from the islands for food, or out of any other fact or incident connected with the relation of those seal fisheries to the territorial possessions of the United States."

The writer proceeds in the same despatch:

"The repeated assertions that the Government of the United States demands that the Behring Sea be pronounced *mare clausum*, are without foundation. The Government has never claimed it, and [illegible] It expressly disavows it. At the same time, the United States does not lack abundant authority, [illegible] ablest exponents of international law, for holding a small section of the Behring Sea for the protection of the fur-seals. Controlling a comparatively restricted area of water for that one specific purpose is by no means the equivalent of declaring the sea, or any part thereof, [illegible]

The United States only claim to hold a small section of Behring Sea for protection of the fur-seals.

United States' Case, Appendix, vol. i, p. 263.

In an earlier passage in the same despatch, Mr. Blaine states:—

"If Great Britain can maintain her position that Behring Sea at the time of the treaties with Russia of 1824 and 1825 was included in the Pacific Ocean, the Government of the United States has no well-grounded claim against her."

Ibid., p. 294.

In replying, on the 21st February, 1891, Lord Salisbury, with reference to the question thus proposed, said:—

"The first clause, 'What are now the rights of the United States as to the fur-seal fisheries in the waters of the Behring Sea outside of the ordinary territorial limits?' is a question which would be very properly referred to the decision of an arbitrator. But the subsequent clause, which assumes that such rights could have grown out of the ownership of the breeding-islands and the habits of the seals in resorting thereto, involves an assumption as to the prescriptions of international law at the period to which Her Majesty's Government [illegible] to [illegible]."

Ibid., p. 295.

Mr. Blaine answered on the 14th April, 1891, proposing Question 5 in its present form, and Sir J. Pauncefote assented in a Memorandum, dated the 3rd June, 1891.

Ibid., p. 305.

The correspondence on the *modus vivendi* affords further evidence of the limits of the claim made by the United States.

Ibid., p. 307.

On the 4th June, 1891, Mr. Wharton, Acting Secretary for the United States, wrote to Sir J. Pauncefote, with reference to Lord Salisbury's

requirement that Russia should concur in the *modus vivendi*, as follows:—

The contention between the two Powers has been limited to Behring Sea eastward of the line of demarcation in the Treaty of 1867.

"I am also directed to remind you that the contention between the United States and Great Britain has been limited to the part of Behring Sea eastward of the line of demarcation described in our Convention with Russia. . . . It was never supposed by any one representing the Government of the United States in this correspondence, or by the President, that the agreement for a *modus vivendi* would be broader than the subject of contention stated in the correspondence of the respective Governments."

And on the 9th June, 1891, Mr. Wharton wrote thus to Sir J. Pauncefote as to another provision of the *modus vivendi*:—

United States' Case, Appendix, vol. i, p. 312.

"As to the third clause of your proposition, I am directed to say that the contention between the United States and Great Britain has relation solely to the respective rights of the two Governments in the waters of Behring Sea outside of the ordinary territorial limits, and the stipulations for the co-operation of the two Governments during this season have, of course, the same natural limitation."

Subject to the above protest, the grounds on which this claim to protective jurisdiction is made will now be considered.

Four grounds of claim.

They are four, viz., the established principles of the common and civil law, the practice of nations, the laws of natural history, and the common interests of mankind.

"Common and civil law." Meaning of terms.

In what sense the terms "common and civil law" are here used, is not very clear. The expression "common law" is technical, and is well understood by the lawyers of the United States and Great Britain; but it has no application to the question now under discussion, except in so far as any general principles can be deduced therefrom. "Civil law" is an expression sometimes used with reference to "Roman law," and sometimes in opposition to the expression "criminal law." It is probably intended to be used in the latter sense, but in neither case has it any application here. The rights of nations must be determined by the principles of international law. The "practice of nations" is only important as evidence of that law, thus bringing the claim once more to the same test.

[illegible]

The laws of natural history are not material to the question of jurisdiction. These laws would be more material to the question of

United States' Case, pp. [illegible] 239.

property, if the question whether seals are *feræ naturæ* were seriously in dispute, but in all probability no such contention will arise. The extraordinary allegation that seals may in any legitimate sense be regarded as domestic animals will be discussed in a subsequent Chapter. The "common interests of mankind" now in question, are only such as international law recognizes.

"Common interests of mankind" now in question are only such as international law recognizes.

What then are the principles of international law applicable to the question. Some hint of them is contained in the passage just examined (Contention 2), where "the ordinary 3-mile limit" is twice mentioned. Without staying to cite authorities showing that the 3-mile zone is now commonly regarded by other nations besides the United States as the limit, for most purposes, of territorial jurisdiction, the following authorities may be cited as showing that fishing is one of those purposes:

Authorities show that the ordinary 3-mile limit applies to fishing.

Mr. Wheaton, in speaking of "those portions of the sea which wash the coasts of any particular State, within the distance of a marine league, or as far as a cannon shot will reach from the shore," says:—

Wheaton's "International Law" (Dana's edition), sec. 180.

[illegible]

Mr. Sheldon Amos says:—

"For some limited purposes, a special right of jurisdiction and even (for a few definite purposes) of dominion, is conceded to a State in respect of the part of the ocean immediately adjoining its own coast line. The purposes for which this jurisdiction and dominion have been recognized are:—(1) *the exploitation of fisheries*; (2) the prevention of frauds on customs laws; (3) the exaction of harbour and lighthouse dues; and (4) the protection of the territory from violation in time of war between other States. The distance from the coast-line to which this qualified possession has been variously measured, the most prevalent estimate being that of a cannon-shot or of a marine league from the shore."

Manning's "Law of Nations," by Sheldon Amos, pp. 119, 120.

Conclusions.

It is submitted that the authorities cited and arguments brought forward support the proposition that the sole right of the United States in respect of the protection of seals is that incident to territorial possession, including the right to prevent the subjects of other nations from fishing in territorial waters.

British Case, p. 160, Prop. 15.

Property in fur-seals.

The next question to be considered is whether the United States have a property in the fur-seals frequenting the Pribyloff Islands.

The following English and United States' authorities are sufficient to show that animals such as seals are *feræ naturæ*; and that, as such, they are *res nullius*.

S[illegible] *feræ naturæ*, [illegible] *res nullius*.

"In things which are *feræ naturæ* none can have an absolute property.

[illegible] (R. 7 Co. 17 b.)

No in books does lie pheasants, partridges, or other fowls which [illegible] (R. 7 Co. 30 b.)

[illegible]

[illegible] (7 Co. 17 b.)

Holdsworth [illegible]

So if pheasants, partridges, or other fowls [illegible]

* * * *

[illegible]

Young [illegible] (7 Co. 17 b.)

[illegible]

And of [illegible] (7 Co. 18 a.)

* * * *

But [illegible] to count the property shall be not [illegible] (7 Co. 17 b.)

Comyn's "Digest," Title, Beasts, F., vol. ii, p. 153.

Blackstone, edition 1862, vol. ii, p. 396.

"Other animals, that are not of a tame and domestic nature, are either not the objects of property at all, or else fall under our other division, namely, that of *qualified*,* *limited*,* or *special** property: which is such as is not in its nature permanent, but may sometimes subsist, and at other times not subsist."

* * * *

Ibid., p. 397.

"A qualified property may subsist in animals *feræ naturæ, per industriam hominis:* by a man's *reclaiming** and making them tame by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty."

* * * *

Ibid., p. 398.

"In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible: a property, that may be destroyed if they resume their ancient wildness, and are found at large."

* * * *

Ibid., p. 399.

"A qualified property may also subsist with relation to animals *feræ naturæ, ratione impotentiæ,* on account of their own inability. As, when hawks, herons, or other birds build in my trees, or rabbits or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires."

Kent's "Commentaries," 9th edition, Boston, 1858, vol. ii, p. 432.

"Animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. While this qualified property continues, it is as much under protection of law as any other property, and every invasion of it is redressed in the same manner.

"The difficulty in ascertaining with precision the application of the law arises from the want of some certain determinate standard or rule, by which to determine when an animal is *feræ vel domitæ naturæ*.

"If an animal belongs to the class of tame animals, as, for instance, to the class of horses, sheep, or cattle, he is [illegible] the subject of absolute property; but if he belongs to the class of animals which are wild by nature, [illegible] their temporary docility to the discipline of man, such as deer, fish, and several kind of fowl, then the animal is the subject of qualified property, and which continues so long only as the tameness and dominion [illegible]."

No suggestion in United States' Case that, even in their own law, the rule is not as laid down by Kent.

It would seem useless to multiply authorities, as there is no suggestion throughout the United

* The *italics* are in the original.

States' Case that, even in their own law, the rule is not as laid down by Kent.

But independently of the question whether fur-seals at large in Behring Sea can be the subjects of property at all, no title to them is shown. The laws of the United States set out in the Appendix to their Case in no way support the view that the Government have any property in fur-seals. By the Law of the 3rd March, 1869, called "A Resolution more efficiently to protect the fur-seal in Alaska," it was resolved—

Apart from the question of property in seals, no title to them is shown.

The United States' laws only reserve the *islands* for the Government.

United States' Case, Appendix, vol. i, p. 92.

"that the *Islands of St. Paul and St. George* in Alaska be, and they are hereby, declared a special reservation for Government purposes."

It is to be noted that nothing is said in this Resolution about Behring Sea, or the fur-seals therein. Similarly the Law of the 1st July, 1870, called "An Act to prevent the Extermination of Fur-bearing Animals in Alaska" (section 4), authorizes a lease of—

The leasing power only authorizes a lease of the right to take fur-seals on the islands, and send vessels there for the skins.

Ibid., p. 93.

"the right to engage in the business of taking fur-seals on the Islands of St. Paul and St. George, and to send a vessel or vessels to said islands for the skins of such seals."

Nor have the lessees any rights in the fur-seals swimming in the non-territorial waters of Behring Sea, for their lease, dated the 12th March, 1890, grants them for a term, in accordance with the Statute, merely—

Ibid., p. 106.

"the exclusive right to engage in the business of taking fur-seals on the Islands of St. George and St. Paul in the territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals."

So lately as the 20th June, 1891, the lessees disclaimed all interest in the present subject of discussion. By a document of that date, they protested against the stop which their Government, in breach of the contract, had put on their business by agreeing to the *modus vivendi*, saying:—

The lessees claim no interest in the present dispute.

British Case, Appendix, vol. iii, "United States No. 3 (1892)," p. 47.

"Sealing Company assume that the right of the United States or its lessees to take fur-seals on said Islands within our ample territorial jurisdiction is beyond dispute, and not

[illegible] to questions of international law by Great Britain and other foreign States.

[illegible] Canadian pendants to Lockyer's report in regard to Behring Sea and this Company respectfully insists that [illegible] Governments set forth in the President's Proclamation, in so far as it prohibits said Company from taking its lawful quota of seal-skins, is in [illegible] the [illegible] rights of this Company, and [illegible] to great loss.

"If it may be assumed, as England has asserted, and this Government has denied, that the eastern portion of Behring Sea is not the marine territory of the United States, but is the 'high seas,' the Company respectfully submits that it is not competent for Great Britain and the United States alone, or for any other two Governments, to determine [illegible] shall be permitted to act in those waters [illegible] sealing or taking seals on the High Seas, and the Company respectfully points out to the Honorable the Secretary of the Treasury that [illegible] has been overlooked by said Agreement between the two Governments, [illegible] United States [illegible] Canadian [illegible] the [illegible] United States [illegible] Canadian [illegible] sealing."

Before concluding this portion of the chapter it is necessary to say a few words on Contention (5.), which has two propositions of fact of a somewhat bold and sweeping character, viz., that the identity of each seal can be established with certainty, and that at all times during its winter migration the seal has a fixed intention or instinct which induces it to return. Assuming, for the sake of argument only, the accuracy of these propositions, they in no way bring the case within the authorities cited above as to the conditions under which property is acquired in animals of wild nature: for to do this (1) the seal must be identified, not only as coming from the Pribyloff Islands, but as having been tame or reclaimed while there; and (2) its intention must be not only to return to the islands, which even wild and unreclaimed seals would do of their own accord, but to return to the control and care of their owner.

[illegible] to [illegible] make them the [illegible] of property.

Conclusion.

It is submitted that the above authorities and arguments support the proposition that the United States have not, nor has any citizen of the United States, any property in fur-seals until they have been reduced into possession, and that the property so acquired endures so long only as they are retained in control.

British Case, p. 160, Prop. 16.

Contention that international usage establishes the right of protection claimed.

It is attempted in the United States' Case to support the claim to the right of protection in the fur-seals outside the ordinary 3-mile limit, upon the ground that other nations have passed laws for the purpose of protecting similar or kindred industries outside the ordinary limits of territorial waters.

The following list shows the order in which these laws are treated in the United States' Case and here :—

(A.)—Falkland Islands.
(B.)—New Zealand.
(C.)—Cape of Good Hope.
(D.)—Canada.
(E.)—Newfoundland.
(F.)—Jan Mayen Seal Fishery.
(G.)—Russia :—White and Caspian Seas.
(H.)—Uruguay.
(I.)—Chile.
(J.)—Argentine Republic.
(K.)—Japan.
(L.)—Russia :—Commander and Robben Islands.
(M.)—Ireland.
(N.)—Scotland.
(O.)—Ceylon.
(P.)—Australia.
(Q.)—France.
(R.)—Italy.
(S.)—Norway.
(T.)—Panama.
(U.)—Mexico.

(A.)—*Falkland Islands.*

Falkland Islands Law is limited to the Colony and its dependencies.

An Ordinance of 1881 is quoted, enacting stringent regulations against seal-hunting between specified dates, "within the limits of this Colony and its dependencies."

United States' Case, p. 221.

In order to suggest that the provisions of this Ordinance are extended to non-territorial waters, Captain Budington, a navigator and seal-hunter, is quoted as an authority for the statement "under oath" that this Ordinance is enforced outside the 3-mile limit.

Ibid., Appendix, vol. ii, p. 593.

It will be found, however, on reference to his affidavit, that Captain Budington only swears as to what was his "understanding" of the Ordinance; and as to any instance of the enforcement of this law against foreigners outside the ordinary limit of jurisdiction, he offers no evidence whatever.

British Commissioners' Report, p. 193.

The Ordinance, with reference to the close season thereby established, enacts (sect. 1) as follows:—

United States' Appendix, vol. i, p. 435.

"No person shall kill or capture, or attempt to kill or capture, any seal *within the limits of the Colony and its dependencies.*"

The terms of the Ordinance are expressly confined to the limits of the Colony, and at no time since the Falkland Islands have belonged to Great Britain, whether before or after the making of the Ordinance in question, has any attempt been made to interfere with the capture of seals outside the ordinary territorial waters. This fact is noted in the British Commissioners' Report.

British Commissioners' Report, p. 156.

(B.)—*New Zealand.*

United States' Case, p. 222.

The next instance cited in the United States' Case is that of New Zealand.

One Imperial and three Colonial Statutes of New Zealand are quoted. The area of jurisdiction conferred is limited by the Imperial Act of 1863.

Ibid., Appendix, vol. i, p. 436.

By section 2 of this Act the Colony of New Zealand is defined as comprising—

New Zealand Law is confined to "territories, islands, and countries" lying between specified limits.

"*all Territories, Islands, and Countries lying between* the 162nd Degree of East Longitude and the 173rd Degree of West Longitude, and between the 33rd and 53rd parallels of South Latitude."

In the United States' Case, however, this Act is described as defining the—

United States' Case, p. 223.

"*boundaries as coincident with parallels* 33° *and* 53° *south latitude, and* 162° *east and* 173° *west longitude*"—

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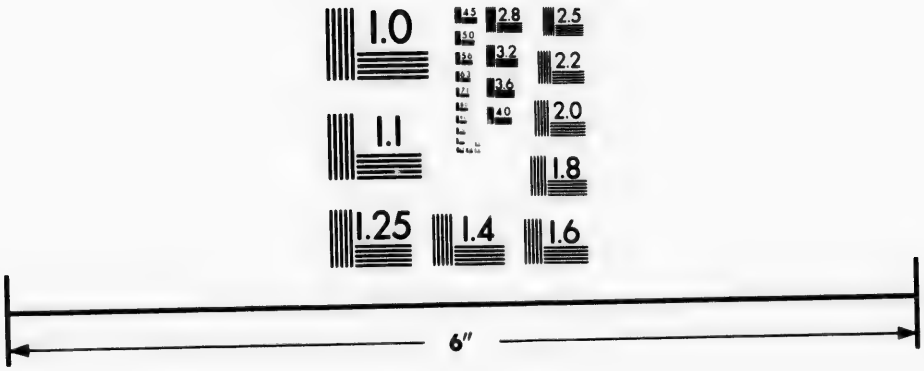

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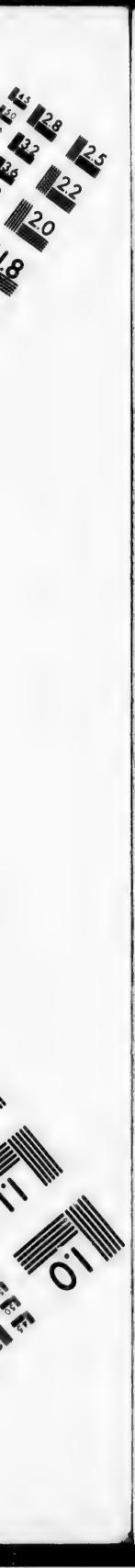
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and the subsequent legislation of the Colony is then discussed upon the assumption that these words convey the true meaning of the Act.

The Act is printed in full in the United States' Appendix, and it will be seen that this misinterpretation of its meaning is the only foundation for the whole argument which is based on New Zealand legislation.

United States' Case, Appendix I, p. 436.

The expressions cited from the New Zealand Acts, as, for instance, "the whole Colony or only in particular parts thereof," "waters or places specified" (in Regulations), "within the jurisdiction of the Government of the Colony," are all limited by the definition of the area of the Colony in the Act of 1863, quoted above.

United States' Case, p. 222 *et seq.* Section 4 of New Zealand Act, 1878. Section 5 of New Zealand Act, 1884. Section 6 of New Zealand Act, 1887. United States' Case, Appendix, vol. i, p. 437 *et seq.*

Special attention, however, is invited in the United States' Case to the reference to the Act of 1884, which, by section 5, empowers the Governor in Council to make, alter, and revoke Regulations which shall have force and effect only in waters or places specified therein.

United States' Case, p. 223. Ibid., Appendix, vol. i, p. 439.

It is alleged that—

"almost unlimited authority is thus conferred upon the Executive to establish close seasons, and to make Regulations respecting the purchase or sale of fish, including seals, and punishment for violation of the law and orders. The definition in the Act of the term 'waters' indicates that it applies to the entire area of the Colony, of which the south-eastern corner is over 700 miles from the coast of New Zealand, although a few smaller islands intervene."

United States' Case, p. 223.

This is illustrated by a coloured Map, upon which are traced imaginary boundaries of the Colony, which are asserted to be designated in the Act of 1863.

Ibid., Appendix, vol. i, p. 437.

The definition of "waters" in that Act, upon which the argument rests, is in itself sufficient to prove the error:—

"'Waters' [according to the definition] means any salt, fresh, or brackish waters *in the Colony, or on the coasts or bays thereof*; includes artificial waters, but does not include waters the property of any private person."

Definition of "waters" in fishery Acts only includes "waters in the Colony, or on the coasts or bays thereof."
Ibid., p. 438.

If "waters in the Colony" included the ocean to a distance of 700 miles from the shore, it would have been unnecessary and absurd to proceed to mention "waters on the coasts or bays" of the Colony.

(C.)—*Cape of Good Hope.*

It is stated in the United States' Case that—

United States' Case, p. 224.

"in the Colony of the Cape of Good Hope sealing is prohibited at the rookeries and in the waters adjacent thereto, except under stringent regulations."

The evidence offered in support of these allegations consists of the following statements:—

W. C. B. Stamp—

Ibid., Appendix, vol. ii, p. 576.

"I am told, although I know nothing about it, that regulations of some kind have been made in the Colony of the Cape of Good Hope."

G. Comer.—The rookeries—

Ibid., p. 597.

"are in the possession or control of a company, as I was then informed, which has the exclusive right to take seals there. We did not dare to go to those rookeries, because sealing was prohibited, and we would not have been allowed to take them in the waters adjacent thereto."

The Regulations in force in this Colony are of the character which appears from the Government Notice which is printed in the Appendix to the British Commissioners' Report. By this Notice all persons are prohibited "from disturbing the seals on the said island" [in Mossel Bay], and are warned from trespassing there.

British Commissioners' Report, p. 194.

The Government Agent states that there is—

Ibid., p. 155.

"practically no pursuit of the animals in the water on these coasts. . . . . The system of killing the seals is the same throughout all the colonial islands, namely, with 'clubs,' by men landing in boats."

Cape of Good Hope Regulations are confined to the islands.

As a matter of fact, the legislation at the Cape of Good Hope is entirely confined to the protection of seals on the islands.

(D.)—*Canada.*

United States' Case, p. 225.

Turning from the fur-seal to the other varieties of seals, it is alleged in the United States' Case that, as regards the hair-seal in the North Atlantic—

"they have thrown about them upon the high seas the guardianship of British statutes. . . . . Canadian statutes prohibit all persons, without prescribing any marine limit, from disturbing or injuring all sedentary seal fisheries during the time of fishing for seals, or from hindering or frightening the shoals of seals as they enter the fishery."

The only Canadian Statute referred to is the Fisheries Act of 1886, which undoubtedly affects Canadian subjects upon the high seas, and all persons within the territorial waters of Canada, but asserts no jurisdiction over foreign subjects outside those waters.

Canadian Statute referred to in United States' Case, asserts no jurisdiction over foreigners outside territorial waters.

United States' Case, Appendix, vol. i, p. 441.

(E.)—*Newfoundland.*

The laws of Newfoundland quoted in the United States' Case are municipal Regulations only, and make no assertion of maritime jurisdiction beyond the 3-mile limit.

The Newfoundland Laws quoted also make no such assertion.

United States' Case, p. 225.

(F.)—*Jan Mayen Seal Fishery.*

No comment is necessary upon the international Regulations in force in the ocean fishery known as the Jan Mayen Seal Fishery, because these are admittedly based upon a Convention between the various nations interested in the fishery. A full account of the nature and origin of these Regulations will be found in the British Commissioners' Report, pp. 198-203.

These Regulations are based on Convention.

British Commissioners' Report, pp. 198-203.

(G.)—*Russia: White and Caspian Seas.*

The Russian laws quoted in the United States' Case, p. 228, are merely municipal Regulations, which do not affect foreigners beyond the usually recognized limit of territorial waters. Article XXI of the Russian Code of Prize Law of 1869 limits the jurisdictional waters of Russia to 3 miles from the shore. So far as the Caspian Sea is concerned, it is not regarded by nations as a high sea.

Russia does not claim jurisdiction beyond territorial limits.

United States' Case, p. 228.

British Case, Appendix, vol. ii, Part II, p. 22.

(H.)—*Uruguay.*

The laws of Uruguay which regulate the taking of seals upon the Lobos Islands do not extend beyond the ordinary territorial jurisdiction, and have no application to pelagic sealing beyond that limit. Seals are taken on the islands, and the State—

"does not permit vessels of any kind to anchor off any of the said islands, and does not allow any works to be constructed that might frighten the seals away."

Uruguay Laws are not shown to extend beyond territorial limits

British Commissioners' Report, p. 169.

United States' Case, p. 229.

Ibid., Appendix, vol. i, p. 449.

(I.)—*Chile.*

The United States' Case says:—

The Governments of Chile and the Argentine Republic have also recently given protection to the fur-seals resorting

United States' Case, p. 229.

to their coasts in the hope of restoring their almost exterminated rookeries."

The mischief, however, appears to have been entirely done by sealers landing on the rookeries. Mr. Comer states that—

United States' Case, Appendix, vol. ii, p. 598.

"if there had been strict regulations enforced, allowing us to kill only young 'wigs,' and not to disturb the breeding seals, I am convinced, and have no doubt, that all these rookeries would be full of seals to-day."

The Chilean law referred to appears to be the Ordinance of the 17th August, 1892, from which the following extracts are made in order to show that the Chilean Government asserts no jurisdiction beyond the ordinary 3-mile limit, but is careful to define strictly the limits of the operation of the Ordinance :—

"*Ordinance regulating the Pursuit at Sea or on Land of Seals or Sea-wolves, Otters, and 'Chungungos' in the Coasts, Islands, and Territorial Waters of Chile.*

The Chilean Law referred to in United States' Case is limited to coasts, islands, and territorial waters.

"Article 1. Only Chileans and foreigners domiciled in Chile are allowed to engage in the pursuit on land or at sea of seals or sea-wolves, otters, and 'chungungos' *in the coasts, islands, and territorial waters* of the Republic, as laid down in Article 611 of the Civil Code.

"No ships can engage in the pursuit to which this Ordinance refers except those Chilean vessels which are in possession of the qualifications required by the Navigation Laws to be considered as such, foreign vessels being absolutely prohibited from engaging in this industry.

"Art. 2. For the purposes of this Ordinance, *the coasts, islands, and territorial waters* of Chile shall be considered as divided into as many zones as there are Maritime Governments in the Republic.

"*The extent of each zone shall be that of the respective Maritime Government.*"

Acting under powers conferred by the above Ordinance, the President of the Republic on the 20th August, 1892, decreed that the fishery of seals—

"be suspended for the period of one year in the regions included in the Maritime Governments of Chiloe and Magellanes, and on the coasts of the Islands of Juan Fernandez."

The general law of Chile as to fisheries is contained in the Civil Code, where it is enacted :—

"Article 585. Things which in their nature are common property, as the product of the high seas, are not subject to any dominion, and no nation, corporation, or individual has any right to monopolize them. The use or enjoyment of them is determined among the citizens of any one nation by the laws of that nation, but between different nations by international law.

No property in fish.

"Article 593. The adjacent sea, to a distance of 1 marine league, measured from low-water mark, is the territorial sea, and under the national dominion; but police administration for the purposes of the security of the State or the carrying out of fiscal Regulations, extends to a distance of 4 marine leagues, measured in the same manner.

Territorial sea: 1 marine league.

"Article 611. Sea fishing is free, but in the territorial seas the right of fishing is enjoyed only by Chilean citizens or domiciled foreigners.

(J.)—*Argentine Republic.*

The Argentine Republic is next referred to in the United States' Case as having "recently given protection to the fur-seals resorting to their coasts." But it is not alleged that the laws have an exterritorial operation on foreigners; nor are the laws themselves set forth in the United States' Case or Appendix.

Argentine Laws are not even alleged (in United States' Case) to have extra-territorial operation on foreigners.

United States' Case, p. 229.

(K.)—*Japan.*

It is also stated that "the Japanese Government has taken steps toward the restoration and preservation of the fur-seals at the Kurile Islands." The extract from Regulations of 1885 referred to by way of verification, and set forth in the Appendix, relates to islands within the territory of Japan, and no other law is set forth or mentioned; nor is it alleged in the Case that any of the Japanese laws relating to seal fisheries have an exterritorial operation. Further, the Regulations of 1885 do not appear to be now in force, for the full official Memorandum supplied on the 14th December, 1891, by the courtesy of the Japanese Government, in answer to a Circular asking for "copies of any printed documents or Reports referring to the fur-seal fisheries, or embodying Regulations provided for these fisheries," sets forth "the several Regulations in force at the present time," among which those of 1885 are not given; and it states that

Japanese Regulations referred to in United States' Case related only to islands, and are no longer in force.

Ibid.

United States' Case, Appendix, vol. i, p. 449.

British Commissioners' Report, p. 160.

Ibid., p. 154.

Ibid., p. 164.

Japanese Government state that there are no means of checking "foreign poachers" outside territorial limits.

there are no means of checking "foreign poachers" "outside the line of territorial limit fixed by international law."

The Russian Regulations apply only to territorial waters.

United States' Case, p. 229.

(L.)—*Russia: Commander and Robben Islands.*

The Russian Regulations of 1881 are printed at p. 116 of the British Case, and the extent of jurisdiction claimed by Russia is fully dealt with at pp. 113–117. It is there shown that these Regulations applied only to the "territorial waters of Russia."

There is no bye-law under "The Seal Fisheries Act, 1868," with extra-territorial operation on foreigners.

Ibid., p. 232.

(M.)—*Ireland.*

As to Ireland, the British Government have never assumed to put in force against foreigners any bye-laws made under "The Seal Fisheries Act, 1868," affecting waters outside territorial limits. And although this Act is relied on in the United States' Case as authorizing the assertion of jurisdiction over foreigners outside those limits, no bye-law having that effect exists, and it would be contrary to the practice of the British Government that any such bye-laws should be made, unless in pursuance of some Treaty with the Power whose subjects may be affected.

Bye-laws with such operation are not made by British Government unless pursuant to Treaty

Similar remarks here

Ibid.

(N.)—*Scotland.*

Similar remarks apply to "The Scotch Herring Fishery Act of 1869," and to all other Acts of the British Parliament which, in terms not expressly limited to British subjects, authorize fishery bye-laws affecting non-territorial waters.

The title of the British Government to the Ceylon pearl fisheries is prescriptive.

Ibid., p. 233.

(O.)—*Ceylon.*

The legislation affecting the pearl fisheries of Ceylon is relied on in the Case of the United States as an example of the exercise of extra-territorial jurisdiction upon the high seas. The claim of Ceylon is not to an exceptional extent of water forming part of the high seas as incidental to the territorial sovereignty of the island, but is a claim to the products of certain submerged portions of land, which have been treated from time immemorial by the successive

Rulers of the island as subjects of property and jurisdiction.

(P.)—*Australia.*

The Australian Pearl Fishery Acts are confessedly limited in their operation to British subjects.

Australian Acts are limited to British subjects.

United States' Case, p. 234.

(Q.)—*France.*

As to France, the United States' Case says that the Decree of the 10th May, 1862—

Ibid., p. 235.

"went so far as to provide in terms that under certain circumstances fishing might be prohibited over areas of the sea beyond 3 miles from shore."

This Decree, of which Article 2 only is set forth in the Appendix to the United States' Case, is given at length in the Appendix to this Counter-Case. Article 1 has the following paragraph :—

Appendix, vol. i, p. 111.

"Les pêcheurs sont tenus d'observer, dans les mers situées entre les côtes de France et celles du Royaume-Uni de la Grande-Bretagne et d'Irlande, les prescriptions de la Convention du 2 Août, 1839, et du Règlement International du 23 Juin, 1843."

This shows that French subjects only are affected; for the Government did, and could, bind its subjects only by the Convention of 1839.

Article 2 is as follows :—

"Sur la demande des prud'hommes des pêcheurs, de leurs délégués et, à défaut, des syndics des gens de mer, certaines pêches peuvent être temporairement interdites sur une étendue de mer au delà de 3 milles du littoral, si cette mesure est commandée par l'intérêt de la conservation des fonds ou de la pêche de poissons de passage.

"L'Arrêté d'interdiction est pris par le Préfet Maritime."

It is not alleged in the United States' Case that the power thus given has been acted on as against foreigners, and it is submitted that Article 2 was not intended to authorize bye-laws affecting foreigners beyond territorial limits.

The construction which supposes the Decree to apply to foreigners assumes it to assert an authority to prohibit fishing to all nations, unlimited in the selection of the kinds of fish to which the prohibition may apply, either as to their being "located" near French coasts, or as to their being those in which France has "an

interest, an industry, and a commerce;" and assumes that the prohibition may extend to mere "fishes of passage," in which the interest of France is only that which it has in common with other nations, and may apply to every part of the high seas.

Assuming the Decree confined to French subjects, no difficulty is caused by this absence of restriction. If extended to foreigners, it goes beyond anything for which the United States contend even in the present case. If all nations made corresponding laws, some as to one fish and some as to another, giving effect to the same by "necessary measures" and "reasonable force," the dangers of the sea would be aggravated in no slight degree.

France only legislates for foreigners within 3 miles.

Appendix, vol. i, p. 113.

The extent to which France claims to legislate for foreign fishermen is now regulated by the Law of the 1st March, 1888.

Article 1 says:—

"La pêche est interdite aux bateaux étrangers dans les eaux territoriales de la France et de l'Algérie, en deçà d'une limite qui est fixée à 3 milles marins au large de la laisse de basse mer."

Statement of United States' Case as to Algerian coral fisheries is not verified by particulars or evidence.

United States' Case, p. 235.

The United States' Case proceeds:—

"Numerous laws have also been enacted by France to protect and regulate the coral fisheries of Algeria, both as to natives and foreigners, and the coral beds so regulated extend at some points as far as 7 miles into the sea."

This is not verified by particulars or evidence.

(R.)—*Italy.*

Ibid.

The United States' Case, after setting forth that there are coral beds at various distances exceeding 3 miles from the coasts of Sicily and Sardinia, says:—

"At present all coral fishing is prohibited on these banks by Royal Decree, for a designated period."

Ibid., Appendix, vol. i, p. 476.

The first of the laws set out in the Appendix, viz., that of the 4th March, 1877 (Article 1), says:—

"The present law regulates the fisheries in the waters of the public domain, and in the territorial sea. . . . The provisions contained in the Merchant Marine Code, and in other laws relating to the water police and navigation, remain unchanged, as regards the treatment of foreigners, and as regards grants in the public domain and the territorial sea."

The provisions referred to in the Merchant Marine Code and elsewhere are not given; nor does the United States' Case say that foreigners have ever been excluded in practice from the fisheries in question; or show that, as matter of construction, the alleged prohibition applies to any but Italian subjects.

Foreigners not shown to be excluded from Italian coral fisheries.

(S.)—*Norway.*

As to Norway, the United States' Case says that the principle of Contention (3.) is recognized in a Statute for the protection of whales, "in Varanger Fiörd, an arm of the open sea about 32 marine miles in width." There is nothing in the Norwegian laws set forth in the Appendix to the United States' Case to show that they apply to foreigners at all. If they do, then, as regards Varanger Fiörd, the question may be whether or not it belongs to the "inner waters" of Norway.

United States' Case, p. 236.

Norwegian Laws not shown to apply to foreigners at all.

(T.)—*Panama.*

The law of Panama next referred to applies, and is alleged to apply, only to pearl fisheries, as to the title or want of title to which, or their proximity to islands or coast, or whether in inland waters, nothing is said. Nor is there anything to show that the law in question applies to foreigners.

Nor are Panama laws.

Ibid.

The assertion in the United States' Case as to the area affected by the law is unsupported by evidence; and it will be observed that the Map of the Panama pearl fisheries in the Appendix does not purport to come from the Panama Government, but to be "prepared at the office of the United States' Coast and Geodetic Survey." From what materials it was so prepared is not explained; and as it refers to a Decree of 1890, and is not dated, it may be supposed to have been made for exhibition to the Tribunal of Arbitration.

The area affected by law referred to is not shown by evidence.

United States' Case, Appendix, vol i, p. 484.

(U.)—*Mexico.*

The facts stated with reference to these pearl fisheries are not verified by evidence. The Mexican Regulations appear only to refer to "the waters of the Republic;" and even then foreigners are admitted to the fisheries on complying with certain Regulations as to registration and payment of tonnage and lighthouse dues.

Mexican Regulations only apply to territorial waters.

Ibid., p. 489.

Ibid., pp. 491, 492.

United States' Case, Appendix, vol. i, note on p. 492.

It is worth observing that, although Mexican legislation is adduced in the United States' Case as an example of the exercise of jurisdiction outside the 3-mile limit, yet in setting out the Regulations of 1874 in the Appendix, those relating to the boundaries of the fishing districts are omitted.

Appendix, vol. i, p. 115.

As showing that Great Britain has not consented to the exercise of fishery jurisdiction by Mexico beyond the ordinary limit, reference may be made to the Treaty of the 27th November, 1888, between Great Britain and that country, of which the last paragraph of Article IV is as follows :—

"The two Contracting Parties agree to consider, as a limit of their territorial waters on their respective coasts, the distance of 3 marine leagues reckoned from the line of low-water mark. Nevertheless, this stipulation shall have no effect, excepting in what may relate to the observance and application of the Custom-house Regulations and the measures for preventing smuggling, and *cannot be extended to other questions of civil and criminal jurisdiction or of international maritime law.*"

Authorities quoted to show that laws of a nation affect none but its own subjects, and foreigners whose persons or property may be within its territorial jurisdiction.

In connection with this branch of the subject, viz., the scope and effect of the legislation of other nations, it is essential to keep in mind the well-known rule of international law, that the laws of a nation affect none but its own subjects and the subjects of other nations whose persons or property may be within its territorial jurisdiction.

No nations have more consistently affirmed this rule than the United States and Great Britain, and a large number of citations might be given establishing this proposition, but a few will suffice.

Two distinguished American jurists may be quoted.

Mr. Sedgwick writes :—

Sedgwick, "Interpretation and Application of Statutory and Court Law," New York, 1857, p. 70.

"As a general proposition, the rule is good that no nation is bound to respect the laws of another nation, except as to persons or property within the limits of the latter. This is the general rule of our law, and this, too, is the language of the great civilians. '*Constat, igitur,*' says Rodenburg [De Stat., ch. 3, s. 1, p. 7], '*extra territorium legem dicere licere nemini, idque si fecerit quis, impune ei non pareri, quippe ibi cessat statutorum fundamentum, robur, et juridictio.*' '*Nullum statutum,*' says P. Voet

[De Stat., s. 4, ch. 2, n. 7, p. 124. Id. 130, 138; ed. 1661], '*sive in rem sive in personam, si de ratione juris civilis sermo institutatur sese extendit ultra statutentis territorium.*' And so says Boullenois: 'Of strict right no laws made by a Sovereign have any force or authority except within the limit of his dominion.' [1 Boullenois *Prin. Gen.*, 6, p. 4.]"

Mr. Justice Story states the same proposition as one of the—

"maxims or axioms which constitute the basis upon which all reasonings on the subject must necessarily rest, and without the express or tacit admission of which it will be found impossible to arrive at any principles to govern the conduct of nations, or to regulate the due administration of justice."

Story, "Commentaries on the Conflict of Laws," 8th edition, by Bigelow. Boston, 1883, s. 20, p. 22. Ibid., p. 21.

The writer proceeds to quote the passages from Rodenburg, Voet, and Boullenois, already cited by Mr. Sedgwick.

Ibid., p. 22.

The rule of English law is no less clear.

Sir P. B. Maxwell, in a work which is the standard authority on the interpretation of Statutes, writes:—

Maxwell on the "Interpretation of Statutes," 2nd edition, London. 1883, chap. vi, p. 168.

"Another general presumption is that the Legislature does not intend to exceed its jurisdiction.

"Primarily, the legislation of a country is territorial. The general rule is that *extra territorium jus dicenti impune non paretur; leges extra territorium non obligant.* The laws of a nation apply to all its subjects and to all things within its territories, including in this expression not only its ports and waters which form, in England, part of the adjacent county, but its ships, whether armed or unarmed, and the ships of its subjects on the high seas or in foreign tidal waters, and foreign private ships within its ports. They apply also to all foreigners within its territories as regards criminal, police, and, indeed, all other matters except some questions of personal status or capacity, in which, by the comity of nations, the law of their own country, or the *lex loci actûs* or *contractûs* applies.

"It is true this does not comprise the whole of the legitimate jurisdiction of a State; for it has a right to impose its legislation on its subjects, natural or naturalized in every part of the world; and, indeed, on such matters as personal status or capacity it is understood always to do so; but, with that exception, in the absence of an intention clearly expressed or to be inferred either from its language, or from the object or subject-matter, or history of the enactment, the presumption is that Parliament does not design its Statutes to operate on them, beyond the territorial limits of the United Kingdom. They are, therefore, to be read, usually, as if words to that effect had been inserted in them. . . . .

Maxwell on the "Interpretation of Statutes," 2nd edition, London, 1883, chap. vi, p. 174.

"Section 2.—*Presumption against a Violation of International Law.*

See 34 Vict., cap. 8.

"So, it is an admitted principle of public law that, except as regards pirates *jure gentium*, and, perhaps, nomadic races and savages who have no political organization, a nation has no jurisdiction over offences committed by a foreigner out of its territory, including its ships and waters as already mentioned; and the general language of any criminal Statute would be so restricted in construction as not to violate this principle . . . . So it has been repeatedly decided in America that an Act of Congress which enacted that any person committing robbery in 'any vessel on the high seas' should be guilty of piracy, applied only to robbery in American vessels, and not to robbery in foreign vessels even by an American citizen."

Ibid., p. 175.

The "Zollverein," Swabey's Reports, p. 98.

To the above quotations may be added the following extract from the Judgment of Dr. Lushington in the case of the "Zollverein":—

"In endeavouring to put a construction on a statute, it must be borne in mind how far the power of the British legislature extends, for unless the words are so clear that a contrary construction can in no way be avoided, I must presume that the legislature did not intend to go beyond this power. The laws of Great Britain affect her own subjects everywhere—foreigners only when within her own jurisdiction."

Conclusions.

It is submitted that an examination of the Colonial and foreign laws referred to in the United States' Case shows that international usage in no way establishes, and in no instance sanctions, the principle asserted by the United States, but, on the contrary, confirms the following propositions at p. 160 of the British Case:—

"The right of the subjects of all nations to navigate and fish in the non-territorial waters of the sea, now known as Behring Sea, remains and exists free and unfettered; and cannot be limited or interfered with, except with the concurrence of any nations affected.

"No regulations affecting British subjects can be established for the protection and preservation of the fur-seal in the non-territorial waters of Behring Sea without the concurrence of Great Britain."

CHAPTER VII.

Consideration of Allegations of Fact put forward by the United States in connection with Point 5 of Article VI.

Section I.—*The Fur-seal is a Marine Animal, and Pelagic in its Habits.*

The United States' Contentions.

(1.) Conclusions, United States' Case, p. 295—
"That the Alaskan fur-seal . . . . is essentially a land animal, which resorts to the water only for food and to avoid the rigour of winter."

(2.) United States' Case, p. 300—
"That in view of the facts . . . . it [the United States] has such a property in the Alaskan seal herd as the natural product of its soil . . . . as entitles it to preserve the herd . . . ."

(3.) United States' Case, p. 90—
"From May to November inclusive (the period when the majority of the seals are on land), the mean temperature is 41° and 42° F."

(4.) United States' Case, p. 122—
"An examination of the table showing the annual killing of seals on St. Paul Island for several years proves conclusively the presence of seals on the islands for at least eight months of the year."

(5.) United States' Case, p. 123—
"The seals evidently consider these islands their sole home, and only leave them from being forced so to do."

Summary of British Reply.

The statement that the fur-seal is a land animal is wholly unwarranted; in truth, it is not only marine, but pelagic in habit.

The statements of witnesses cited in the Case of the United States are alone sufficient to show that the fur-seal is a marine animal, and no naturalist is found to hold an opinion to the contrary.

The time in each year during which the fur-seals (or some considerable portion of them) remain on or about the Pribyloff Islands for purposes of reproduction is, in the United States' Case, very greatly exaggerated. This is done by means of substituting extreme and exceptional dates for average ones, and by means of combining in a single period the several times of stay about the islands of different ages and sexes of seals.

Statements contained in the Case itself of the United States, with respect to the arrival and departure of various classes of seals, show that these may spend respectively from three to five and a-half months on or about the breeding-islands. But individual seals (with the exception of the old bulls) frequent the adjacent waters for much of the time of their resort to the islands, and many young males and virgin females probably do not land at all. Professor J. A. Allen gives the average length of stay ashore of the *Otariidæ* generally, as about one-third of the year.

The industry growing out of the taking of fur-seals is described as a "fishery" in official documents and acts.

The food of the fur-seal is entirely derived from the sea, and little, if any, of it is obtained even in the vicinity of the Pribyloff Islands.

Contention novel and unprecedented.

The initial assertion above quoted, which appears in the first lines of the "Conclusions," or summing up of the contentions held by the United States, is of a character so unprecedented, and so entirely opposed to everything known respecting the fur-seals or other allied animals, that it is scarcely conceivable that it is intended seriously to maintain it. It was certainly not to be anticipated that it would be necessary, in opposition to such a statement, to point out that the habits and organization of the fur-seal, with that of other pinnipeds (the sub-order to which the fur-seal belongs), are directly the converse of those formulated in the proposition just quoted:—That the fur-seal resorts to the land only for or in connection with its reproduction; that its stay upon the land is but temporary, and is governed by the requirements of reproduction; that it remains on or about the land for a portion only of the year; that, during the remaining, and much the greater part, of each year, it is not only aquatic but pelagic in its habit; that, in connection with this mode of life, its whole form and organization is fitted for existence in the sea; and that it is provided with fins and not with feet, as indeed is implied by the very name of the zoological sub-order under which it is included.*

Organization and habits wholly opposed to such contention.

Seals fish-like in form, and have fins, not feet.

It is scarcely necessary to go further than the limits of the Case presented by the United

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* In the opening paragraph of his technical characterization of the animals of the sub-order *Pinnipedia*, Professor Allen gives the first and most distinctive character as follows:—

"Limbs pinniform, or modified into swimming organs, and inclosed to or beyond the elbows and knees within the common integument." ("Manual of North American Pinnipeds," p. 3.)

Professor Sir W. H. Flower, K.C.B., F.R.S., similarly places this character first, writing:—

"These [the *Pinnipedia*] differ from the rest of the *Carnivora* mainly in the structure of their limbs, which are modified for aquatic progression,—the two proximal segments being very short and partially enveloped in the general integument of the body, while the third segment, especially in the hinder extremities, is elongated, expanded, and webbed." ("Encyclopædia Britannica," vol. xv.—"Study of Mammals," Flower and Lydekker.)

States, to disprove the assertion just alluded to:—thus, on p. 126 *et seq.*, evidence is cited to show that "during their migration," or, in other words, during that greater part of the year in which the animal is not found upon the Pribyloff or other breeding-islands, the fur-seal never lands, and does not even frequent "inland waters"—that, in effect, it is pelagic in its habit of life. The facts contained in the Report of the British Commissioners, and evidence contained in the Appendix to this Counter-Case, show that the seal does occasionally land even during the winter months on the coasts of British Columbia, and that it also still at times frequents the sheltered channels and straits of that coast; but the accuracy of the general statement that the fur-seal is pelagic in its mode of life cannot properly be disputed.

United States' Case, p. 126 *et seq.*

Rarely lands except on the breeding-places.

It may be necessary, however, in view of the confident assertion by the United States that the fur-seal is "essentially a land animal;" and the dependent suggested inference that the United States has some property right in the fur-seal as "the natural product of its soil, made chiefly available by its protection and expenditure;" to adduce some further evidence as to the marine or pelagic nature of the animal.

Ibid., p. 295.

Ibid., p. 300.

All authorities class the fur-seal as marine, not terrestrial.

Professor J. A. Allen, the Curator of the American Museum of Natural History, is specially referred to and relied upon in the United States' Case in connection with the natural history of the fur-seal. He is well known to naturalists from his excellent "Monograph on the North American Pinnipeds." It is therefore of importance to quote the terms in which, in the monograph named, he characterizes this group of animals. He writes:—

Professor J. A. Allen in his "Monograph."

Allen, "Monograph of North American Pinnipeds," Washington, 1880, p. 1.

"The *Pinnipeds* or *Pinnipedia*, embracing the Seals and Walruses, are commonly recognized by recent systematic writers as constituting a sub-order of the order *Feræ* or Carnivorous Mammals. They are, in short, true Carnivora, *modified for an aquatic existence*, and have consequently been sometimes termed 'Amphibious Carnivora.' *Their whole form is modified for life in the water, which element is their true home. Here they display extreme activity, but on land their movements are confined and laboured. They consequently rarely leave the water, and generally only for short periods, and are never found to move voluntarily more than a few yards from the shore. Like the other marine Mammalia, the Cetacea and Sirenia (Whales, Dolphins, Porpoises, Manatees, &c.), their bodies are more or less fish-like in general form, and their limbs are*

Allen's "Monograph of North American Pinnipeds," p. 1.

transformed into swimming organs. As their name implies, they are fin-footed. Generally speaking, the body may be compared to two cones joined basally. . . . . In contrasting them with the ordinary or terrestrial mammals, we note that the body is only exceptionally raised, and the limbs are confined within the common integument to beyond the knees and elbows, *and are hence to only a slight degree serviceable for terrestrial locomotion.* . . . .

"The existing Pinnipeds contain three very distinct minor groups or families, differing quite widely from each other in important characters; these are the Walruses or *Odobænidæ*, the eared seal or *Otariidæ*, and the earless seals or *Phocidæ*. . . ."

Professor J. A. Allen in his special Report.

The language above quoted may be contrasted with that used by Professor Allen in the paper specially prepared for the purposes of the Case of the United States. He (Professor Allen) there writes as follows:—

United States' Case, Appendix, vol. i, p. 367.

"The common seals, the eared seals, and the walruses form a well-marked group of the carnivorous mammalia, constituting a sub-order (*Pinnipedia*) of the order *Carnivora*. They are carnivores specially *modified for aquatic locomotion and semi-aquatic life. Their ancestors were doubtless land animals, probably more nearly allied to the bears than to any other existing mammals. They are still dependent on the land or on fields of ice for a resting-place, to which they necessarily resort to bring forth their young. They are thus very unlike the sea-cows and the whole tribe, which are strictly aquatic, bringing forth their young in the water, and entirely unfitted for locomotion on land.*"

The statement that the pinnipeds generally have been evolved, in the course of geological time, from animals resembling the bears, has no relevancy when cited in connection with the present inquiry. The actual habits of seals, it may be arguable, have some bearing on the questions at issue, but the supposed history of their evolution can have none.

Dr. W. H. Dall.

Dr. W. H. Dall, who, as a well-known naturalist having personal knowledge of the Pribyloff Islands, is also relied upon and frequently referred to in the Case of the United States, describes the fur-seals as animals—

Pacific Coast Pilot; Coast Pilot of Alaska, Appendix I, p. 35.

"whose normal habitat would seem to be the sea itself, and whose temporary sojourn on the land is only rendered possible by the uniform coolness and moisture of the islands."

Sir W. H. Flower, K.C.B., F.R.S.

Sir W. H. Flower, K.C.B., F.R.S., a specially competent authority on this subject, in his

article on *Mammalia* in the "Encyclopædia Britannica," speaks as follows of the *Pinnipedia*:—

"The animals of this group are all aquatic in their mode of life, spending the greater part of their time in the water, swimming and diving with great facility, feeding mainly on fish, crustaceans, and other marine animals, and progressing on land with difficulty. They always come on shore, however, for the purpose of bringing forth their young."

Captain Bryant.

Captain Bryant, who had long experience in connection with the fur-seals of the Pribyloff Islands, and whose evidence, contained in a very recent statement made by him in connection with the present Arbitration, is prominently quoted in the Case of the United States, also writes as follows:—

Seals resort to Pribyloffs solely for reproduction.

"The fur-seals resort to the Pribyloff Islands during the summer months for the sole purpose of reproduction. Those sharing in these duties necessarily remain on or near the shore until the young are able to take to the water."

Quoted in Allen's "Paper on the Eared Seals," Bull. Mus. Comp. Zool., vol. ii, No. 1, p. 95.

The fact that fur-seals are capable of a certain freedom of motion while on the land is largely the result of the greater power of active motion which characterizes these animals at all times, and which is equally or even more marked at sea, where in particular the dolphin-like leaps of the fur-seals have been frequently noted as entirely different from anything in the more leisurely and heavy mode of progression of the hair-seals or walruses.

Allen's "Monograph of North American Pinnipeds," p. 187. Flower, "Encyclopædia Britannica," vol. xv, pp. 442, 443.

In this particular connection, it may be of interest further to quote Mr. H. W. Elliott, the United States' Special Agent. His observations respecting the fish-like and essentially aquatic habit of the fur-seals are as follows:—

Elliott, "United States' Census Report," pp. 45, 163.

Mr. H. W. Elliott.

Fish-like habits.

"They all swim rapidly, with the exception of the pups, and may be said to dart under the water with the velocity of a bird on the wing; as they swim they are invariably submerged, running along horizontally about 2 or 3 feet below the surface, guiding their course with the hind flippers as by an oar, and propelling themselves solely by the fore feet, rising to breathe at intervals which are either very frequent or else so wide apart that it is impossible to see the speeding animal when he rises a second time.

Ibid., p. 45.

"How long they can remain under water without taking a fresh breath, is a problem which I had not the heart to solve, by instituting a series of experiments at the islands; but I am inclined to think that, if the truth were known in regard to their ability of going without rising to

breathe, it would be considered astounding..... All their movements in water, whether they are traveling to some objective point or are in sport, are quick and joyous. ..... They sleep in the water a great deal, too, more than is generally supposed, showing that they do not come on land to rest—very clearly not."

Length of resort to breeding islands.

In the Case of the United States very ambiguous and even contradictory statements are made respecting the length of time in each year during which the fur-seal resorts to the land, a matter which it may be presumed is rather an important one in relation to the claim made that it is "essentially a land animal."

Statements in United States' Case questioned.

United States' Case, p. 90.

It is stated in the Case of the United States that the period when the majority of the seals are on land is from May to November inclusive.

In the Report of the United States' Commissioners it is again stated that—

Ibid., pp. 321, 322.

"The amphibious fur-seals are not only intermediate between the hair-seals and terrestrial carnivorous mammals in structure and means of locomotion, but also in habits, for they spend fully half their lives on land."

It is elsewhere said that—

Ibid., pp. 122, 123.

"An examination of the table showing the annual killing of seals on St. Paul Island for several years proves conclusively the presence of seals on the islands for at least eight months of the year, and that they have in fact been killed there in every month of the year."

Fallacies upon which erroneous statements based.

The apparent object of these statements is to show that, for the greater part of each year, the seals remain ashore upon the breeding-islands; but it is submitted that such statements of a general kind are essentially misleading, and this for several reasons. As in the case of all migratory animals, certain individuals are found to arrive long before the mass of their kind in almost every year; while others, either from individual eccentricity or because of age, weakness, or wounds, are in a similar manner left behind. Such "strays" should not, however, in any case, be regarded as indicating the dates of the period of the arrival and departure of the main body of animals. The Tables quoted as Appendix (B) to the Report of the United States' Commissioners, and giving the first arrivals of seals at the Pribyloff Islands for a number of years, show this general rule in the case of the fur-seal; and, if the earliest dates of arrival should be accepted as indicating the opening of

"Strays" in migration.

United States' Case, pp. 385, 386.

the periods of arrival of the seals as a whole, would be entirely misleading.

Sexes arrive and leave at different times.

The subject is further complicated by the fact that seals of different sexes and ages do not arrive simultaneously at the breeding-islands or leave these islands at the same times. Thus it becomes possible to make general statements which, though in a measure based on fact, convey no real idea of the average time spent by the seals upon the land. For this reason it will be found that the particulars given in the United States' Case as to the dates of the arrival and departure of the various sexes and ages of seals do not correspond with the above-quoted general allegations, though, even in these statements, extreme limits rather than average ones are in most cases taken.

Thus aggregate dates do not represent actual residence.

Particulars given in United States' Case do not correspond with quoted contentions.

Thus it is stated in the United States' Case that the bulls arrive in "the latter part of April or first few days of May," and begin to leave the islands about the 1st August, and "continue going till the early part of October." This, in other words, would make the stay of the bulls about the islands from three to four months.

United States' Case, p. 108.

Ibid., p. 112.

Bulls resort to islands for 3 to 4 months;

Ibid., pp. 108. 109.

The cows, it is stated—

"begin to appear toward the latter part of May or 1st June;"

while—

"the great majority, however, do not haul up until the latter part of June; and the arrivals continue until the middle of July."

They are stated to remain on the islands till about the middle of November. Thus, as an extreme limit for the stay of the cows, the above shows a period of four months to five months and a half.

Ibid., p. 120.

Cows, 4 to 5½ months;

Similarly the "bachelors," or young male seals are said to—

"begin to arrive in the vicinity of the islands soon after the bulls have taken up their positions upon the rookeries, but the greater number appear toward the latter part of May."

Ibid

In regard to the departure of this class, it is said that this—

"generally takes place at the same time the cows and pups leave the islands, though a few bachelors always are found after that period."

Ibid., p. 122.

Bachelors, 5½ months at most.

So that, as an extreme limit of time for the stay of the bachelors, we have, according to the statements here made, about five months and a half.

Evidence given in United States' Case shows still shorter resort to breeding islands.

But the evidence of those personally familiar with the breeding-islands, even that which is appended to the United States' Case, invariably gives shorter limits of time for the sojourn of any considerable numbers of the seals on the islands.

Mr. Fowler.

Thus, Mr. Fowler, the agent of the lessees, states :—

United States' Case, Appendix, vol. ii, p. 25.

"The bull seals arrive on the islands from the latter part of April to June 15th, and most all of them leave in August and September. . . . . The cows come to the islands between June 1 and July 20, and commence leaving in October. . . . . The young male seals from 2 to 5 years old come in May or June. . . . . The pups are born soon after the cows arrive, and remain until October or November."

Mr. Morton.

Mr. Morton, agent for the lessees, and Treasury Agent, says :—

Ibid., p. 67.

"By the middle of September the systematic organization of the rookeries is entirely broken up, and the major part of the seals have left the land."

J. Kotchooten.

Jacob Kotchooten, a native sealer, says :—

Ibid., p. 131.

"The most of the bulls leave the island in September, and the cows in the last of October, and early in November."

Mr. Morgan.

Mr. Thomas F. Morgan, agent of lessees for many years :—

Ibid., pp. 62, 63.

"The pups which left the island the year before have now become 'yearlings,' . . . . not coming on shore until some time in August or September. . . . . The male seal, now called a bull, returns to the islands about the 1st May. . . . . About the 1st August he again takes to the water."

Mr. Fratis.

John Fratis, twenty-two years on St. Paul Island :—

Ibid., p. 108.

"The cows appear about the 10th June, and they are all on the rookeries about the middle of July. . . . . The bachelors come in May, ... and they continue coming till July. . . . . The cows and bachelors begin to leave in October and November, but their going is regulated somewhat by the weather."

Dr. L. A. Noyes, agent of lessees:— Dr. Noyes.

"From the time the bulls haul out in May till they leave in September," &c. United States' Case, Appendix, vol. ii, p. 81.

Mr. Falconer, Treasury Agent:— Mr. Falconer.

"He [the bull seal] has come earlier than formerly to the islands, having arrived in May. . . . . They depart in August and September." Ibid., p. 166.

Even these statements do not properly represent length of stay of main body of seals.

All the above periods of stay on the islands would, however, be very materially reduced if the period of stay of the main body of seals of each class were alone taken into account; and it is moreover to be remembered that, as above stated, they refer only to the periods during which the seals are found on or about the islands. As a matter of fact, the old bulls are the only seals which remain continuously for any lengthened period ashore, all other classes spending a considerable portion of the time in the adjacent water. It is besides more than probable that many of the bachelors, as well as the virgin cows, if they haul out upon the islands at all, do so for very brief periods only. British Commissioners' Report, pp 14, 76.

In fact, the evidence proves that the different classes of seals resort to the islands at different dates and for different periods. Moreover, of the classes that are ashore, with the exception of the breeding seals, it is probable that at least one-third of their number are at any given time disporting themselves in the waters immediately adjacent to the rookeries. But while it is true to say that the great body of the seals commence to come ashore in May and June, and to leave in September and October, it will be seen that no single class of seals resorts to the shore for the aggregate period thus included. Maynard, 44th Congress, 1st Sess., H. R., Ex. Doc. 43, p. 4.

Individual seals, moreover, spend much time in the water even while at the islands.

In fact, Professor J. A. Allen, in his article specially prepared for the United States' Case, says of the eared seals (*Otaridæ*) generally:— United States' Case, Appendix, vol. i, p. 370.

"They are polygamous, and resort to the land to breed, where they spend *almost continuously about one-third of the year.*"

Professor Allen gives 4 months as average time of residence.

United States' contention as to length of stay thus disproved by evidence in United States' Case.

It is thus established that on the data as given in the Case of the United States, no statement to the effect that the fur-seal spends even half of the year ashore can be substantiated. United States' Case, pp. 90, 321 322.

Actual length of resort to breeding islands.

From a study of the most trustworthy published observations, notably those of Bryant, Elliott, and Maynard (writers who, in framing their official Reports, had no reason for unduly limiting or extending the period during which the fur-seal naturally resorts to the land), the British Commissioners report as follows:—

British Commissioners' Report, para. 30.

"With reference to the length of the period during which the fur-seals resort to the shore:—the breeding males begin to arrive at the Pribyloff Islands at varying dates in May, and remain continuously ashore for about three months, after which they are freed from all duties on the breeding rookeries, and only occasionally return to the shores. The breeding females arrive for the most part nearly a month later, bearing their young immediately on landing, and remaining ashore, jealously guarded by the males, for several weeks, after which they take every opportunity to play in the water close along the beaches, and about a month later they also begin to leave the islands in search of food, and migrate to their winter habitat. The young males and the young females come ashore later than the breeding seals, and at more irregular dates, and 'haul out' by themselves. Lastly, the pups of the year, born in June and July, commence to 'pod,' or herd together away from their mothers, towards the middle or end of August, and after that frequent the beaches in great numbers, and bathe and swim in the surf. They remain on the islands until October, and even November, being among the last to leave."

Details respecting the landing and departure of the various classes of seals will be found in paragraphs 174 and 188 of the British Commissioners' Report.

From the quotations and references given above, it is clear that the fur-seal has never been considered by naturalists "a land animal;" and almost innumerable citations in support of this statement might be made.

d industry, in all State publications of the United States and Acts of Congress, called a fishery.

It will, however, here be sufficient to show, in addition, that in the official publications and documents of the United States, as a matter of common usage, the industry depending on the fur-seal has throughout been called a "fishery." It is not to be assumed that in the choice of this term the fur-seal was supposed to be a "fish" from the standpoint of a zoologist, but rather that its nature and habits clearly show that it is a marine animal, and not a product of the soil, as is now, and for the first time in history, gravely asserted. The industry growing out of the capture of the fur-seal is in

United States' Case, p. 300.

effect a "fishery" in a sense analogous to that in which this term is used in many other cases, such as the "whale fishery," or the "oyster fishery." In the Appendix, the titles of several Acts of Congress and other official documents, ranging in date from 1832 to 1892, are cited as examples of this, in which the industry is invariably described as a "fishery"

Appendix, vol. i, p. 122.

Food entirely derived from the sea.

It should further be borne in mind that the food upon which the fur-seal subsists is entirely derived from the sea, and no portion of it from the land. The quantity consumed by the seals individually, and also as a whole, is dealt with later in this Counter-Case (p. 152); and it is there shown to amount to many millions of tons annually. It is still further worthy of remark that but a small proportion of this food is derived even from the neighbourhood of the Pribyloff Islands, for it is admitted in the United States' Case that the bulls do not feed during the period in which they reside upon the islands; and as to the other seals frequenting the islands, the British Commissioners were of opinion that they also do not feed whilst on or about the islands. In support of this belief they quote the fact that the rookeries and hauling-ground were searched in vain for any traces of excrement, and that, having killed a considerable number of seals of all descriptions, and examined the contents of their stomachs, no trace of food was found. Continued observations in 1892 entirely support this opinion.

Seals do not feed while resorting to the breeding-islands.

British Commissioners' Report, paras. 242, 243.

Appendix, vol. i, p. 144.

Conclusions.

It is, therefore, evident that no grounds exist to justify the application to the far-seal of the designation of land animal, when admittedly it derives its entire sustenance from the ocean, and passes there two-thirds, if not more, of its existence.

SECTION II.—*The Fur-seal is in no sense a Domestic Animal.*

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 295—
"The seal is domestic in its habits and readily controlled by man while on the land."

(2.) United States' Case, p. 154—
"The killing of a portion of the surplus male life is undoubtedly a benefit to the herd, as it is with other domestic and polygamous animals."

(See also pp. 147 to 150, "Control and Domestication.")

SUMMARY OF BRITISH REPLY.

Though fur-seals are to a certain degree controllable when on land, this results from their helplessness while there, and such control has nothing to do with domestication.

The seals are now fearful of man, even when collected in great numbers ashore; though it is probable that, when their breeding-places were first visited, ignorance caused them to be fearless.

All ideas attached to the word "domestic" are wanting in the case of fur-seals. Man does not provide their food; his care is at most of a negative kind, and consists in the avoidance of acts which would tend to drive them wholly away from the breeding-islands. They would not suffer, but, on the contrary, would profit by his departure from these islands.

During the greater part of the year the seals are wholly removed from the cognizance of persons on the Pribyloff Islands; and till very lately their winter haunts were not even known.

No scientific evidence can be adduced in support of the contention that the seal is other than a wild animal; and it is believed that no credible evidence from any source can be quoted to such an effect.

Object of the assertion that the seal is domestic.

The peculiar claim embodied in the above quotations from the United States' Case is evidently put forward with the object of avoiding the consequences resulting from the fact that the seal is an animal *feræ naturæ*, and as a step essential toward the claim of "property" in seals; and from this point of view it requires examination, notwithstanding its extraordinary nature. It is to be observed that, in other connections and for another purpose in the Case of the United States, it is admitted that fur-seals are animals *feræ naturæ*.

United States' Case, pp. 230 and 299.

Basis of the assertion.

The whole argument advanced in the Case of the United States as to the domestic character of the fur-seal, with the allegations upon which it is based (given in detail in the Appendix of the Case), resolve themselves into the statement, given

in more or less varying forms, that the animals are "readily controlled by man while on the land."

Control not domestication.

United States' Case, p. 295.

The only sense in which the assertion that the seals are readily controlled while on land by man, is that referred to by the British Commissioners, who write:—

British Commissioners' Report, para. 31.

"While resorting to or remaining on the land, the fur-seal is practically defenceless."

And elsewhere:—

"Active and graceful as a fish in the water, the fur-seal is at best clumsy and awkward in its movements on land."

Ibid., para. 704.

The seal controllable on land because defenceless there.

The ease with which it is possible to drive bodies of seals on land, which is the principal argument used to show their "domestic" character, therefore depends in reality upon the unfitness of the animal for progression by land, and the consequent impossibility of its escape from the drivers by flight.

The fur-seal endeavours, and for the greater part of the year with success, to avoid mankind. Man is unable to herd it, provide it with food, or protect it from its many natural enemies. But the fur-seal, while on shore, cannot find freedom and safety by flight or by resistance. It is thus because the fur-seal is incapable on shore of speedy or prolonged locomotion or exertion, that it can be, and is, brought temporarily under the control of man. But it is to be noted that it is absolutely uncontrolled and uncontrollable by man when it chooses to proceed to sea, as it invariably does for the greater part of the year.

Wholly uncontrollable elsewhere.

The further circumstance, also adduced in the Case of the United States, that, after being driven to the vicinity of the killing-grounds, such bodies of seals may without difficulty be kept together till the time for killing arrives, depends in part on the same fact, and in part on the additional circumstance that the seals are then completely exhausted. Even when eventually turned away from the killing-grounds, the spared seals are often in too exhausted a state to return voluntarily to the sea for long times.

Circumstances permitting a temporary control.

Ibid., paras. 710, 711.

Seals fearful of man.

Neither is it difficult to show by recorded observations that the allegations made to the effect that the seals do not show fear when approached by man on the islands are unfounded, or, at least, so much exaggerated as to convey a wholly wrong impression. When on the breeding-islands they

are certainly not so wary as when at sea. They are, in fact, particularly occupied at this season by their own affairs; and, besides, like other wild animals, under such circumstances to some extent emboldened by numbers. Mr. Elliott writes on this point:—

Quotations from authors on this subject.

Census Report, p. 65.

"But the companionship and the exceeding number of the seals, when assembled together annually, makes them bold."

They are nevertheless readily alarmed.

Mr. Elliott, in his evidence before a Congressional Committee, says:—

44th Cong., 1st Sess., H. R., Report No. 623, p. 78.

"The females are exceedingly timid. The males are very bold, and will not leave unless driven off, but the females will. I, myself, unaided, could drive every seal off that island in two years, without killing one."

Again, in evidence before another Committee of Congress, he says:—

50th Cong., 2nd Sess., H. R., Report No. 3883, p. 137.

"Let anybody disturb them [the breeding seals] however, go among them with fire-arms or clubs or along the beach even, and they will soon take the alarm and leave."

Mr. H. A. Gliddon, Government Agent on the Pribyloff Islands, also says:—

Ibid., p. 25.

"The seal is a sensitive animal, and it does not like to be disturbed, and it must not be disturbed. If they are they will not go there [Pribyloff Islands] at all."

Ibid., pp. 63, 251.

In the same Report, Messrs. T. F. Morgan and J. H. Moulton give like statements.

Professor J. A. Allen quotes Captain Bryant as follows:—

British Commissioners' Report, para. 331, Bull. Mus. Comp. Zool., vol. ii, Part I, p. 97.

"Constant care is also necessary lest thoughtless persons incautiously approach the breeding-grounds, as the stampede of the seals which would result therefrom always destroys many of the young."

Baron Nordenskiöld likewise says:—

Ibid., para. 333, "Voyage of the 'Vega,'" vol. ii, p. 290.

"The young ones are often smothered by the old when the latter, frightened in some way, rush out into the sea. After such an alarm hundreds of dead pups are found on the shore."

One of the witnesses cited by the United States says that the seals—

United States' Case, Appendix, vol. ii, p. 2.

"grow much tamer, too, with repeated driving, and seem to learn the road and what is expected of them on the killing-ground."

See pp. 200 *et seq.*

The so-called "domestication" thus resulting from repeated driving is fully explained by the

details given in another page with respect to the methods and results of such driving.

So far from having had their comparative boldness while on land impressed upon them by any process of "domestication," it is indeed more than probable that the northern fur-seals, like other animals when resident where they have from time immemorial been exempt from attack, were at first entirely inapprehensive of danger. Thus, of the fur-seal of the Southern Hemisphere, Captain Morrell writes:—

Originally fearless, contact with man has produced timidity, not domestication.

"When these animals are for the first time visited by man they evince no more apprehension of danger from their new guests than did the natives of San Salvador when first visited by the Spaniards; and the confidence of the poor seals is requited in the same manner as theirs was—by robbery and murder. In fact, they will lie still while their companions are slaughtered and skinned."

United States' Case, Appendix, vol. i, p. 377.

A similar impression is conveyed by the original Russian accounts of the fur-seals of Behring Island.

"Monograph of North American Pinnipeds," p. 344.

The control of a given body of seals on land is thus precisely analogous to that which may be exercised over terrestrial animals such as deer, when found in or driven into the water; and much resembles the domestic habits which might equally be attributed to salmon when congregated on their spawning-grounds, as compared with their timidity at other times. In a manner quite comparable to that employed in killing seals upon the breeding-islands, the sea-turtle in other parts of the world is taken when resorting to the shores to deposit its eggs; but no one has asserted that the marine turtles are to be classed as domestic animals because of their helplessness on land, or has called them land animals in consequence of their resort to the shores for breeding.

Analogy with other animals.

Neither can the fur-seal be classed as a domestic animal by reason of any specific care exercised over it by man in connection with its production or protection. Man has intruded and has established himself on the breeding resorts. The actual nature of the interference of man with the fur-seals is clearly expressed in the Report of the British Commissioners, who write:—

Man exercises no specific care over the seal.

British Commissioners' Report, para. 35.

"Their former places of secure retreat were invaded by man, while, during the greater part of each year, they remained exposed on the open ocean as before to in-

But is an invader on its breeding resorts.

numerable accidents, and entirely beyond the control or possible protection of those in charge of the breeding-islands. The inroads of the seal-killers on the islands might be modified in kind or in degree, but their general tendency could not be reversed."

British Commissioners' Report, paras. 35, 36.

Since the occupation by man of the breeding-islands, the steps taken in the interest of fur-seal life upon them have consisted solely of measures more or less effective to prevent the disturbance of the animals, and to leave them as much as is possible, in view of the demands made for killing, to themselves. If these islands should be entirely abandoned by man, and left unvisited by him, the fur-seals, so far from suffering in any respect, would tend gradually, but certainly, to revert to the favourable conditions formerly existing; and would undoubtedly increase in numbers till checked by such natural causes as tend to set limits to the increase of all animals.

Should he abandon these islands, the seals would profit.

Ibid., para. 32.

Seals are not fed on the islands; they leave emaciated.

All the ideas commonly attaching to the word "domestication" are wanting in this case. Not only are the fur-seals not fed by man, but they do not obtain a particle of food while upon the islands, and little, if any, while in the adjacent territorial waters. Their resort to the Pribyloff Islands is strictly in connection with the requirements of the breeding period. They arrive there fat and in good condition, and, after their prolonged period of fasting, leave in an emaciated state for their feeding-grounds in the great tracts of ocean to the southward.

Bull. Mus. Comp. Zool., vol ii, No. 1, p. 37. "Monograph of North American Pinnipeds," p. 227, &c.

Mr. H. W. Elliott.

Mr. H. W. Elliott, in his Monograph, published in 1881, writes as follows on the amount of control which man is capable of exercising over the fur-seal:—

United States' Census Report, p. 66.

"I am free to say that it is not within the power of human management to promote this end [an increase in the number of seals] to the slightest appreciable degree over its present extent and condition as it stands in the state of nature, heretofore described. It cannot fail to be evident, from my detailed narration of the habits and life of the fur-seal on these islands during so large a part of every year, that could man have the same supervision and control over this animal during the whole season which he has at his command while they visit the land, he might cause them to multiply and increase, as he would so many cattle, to an indefinite number—only limited by time and the means of feeding them. But the case in question, unfortunately, is one where the fur-seal is taken, by demands for food, at least six months out of every year, far beyond the reach or

even cognizance of any man, where it is all this time exposed to many known powerful and destructive natural enemies, and probably many others, equally so, unknown, which prey upon it, and, in accordance with that well-recognized law of nature, keeps this seal life at a certain number—at a figure which has been reached, for ages past, and will continue to be in the future, as far as they now are—their present maximum limit of increase, namely, between 4,000,000 and 5,000,000 seals, in round numbers."

On another page the same author writes:—

"During the winter solstice—between the lapse of the autumnal, and the verging of the vernal equinoxes—in order to get this enormous food supply, the fur-seals are necessarily obliged to disperse over a very large area of fishing-ground, ranging throughout the North Pacific, 5,000 miles across between Japan and the Straits of Fuca." United States' Census Report, p. 65.

On the same subject, Lieutenant W. Maynard, United States' navy, in his Special Report of 1874, says:— Lieutenant Maynard.

"But in reality we do not even know where they are for seven months in each year, while we do know that they have deadly enemies. . . . . Our protection of them can only be partial, that is to say, we can limit the number to be killed, when they are within our reach, and prevent their being disturbed on the breeding rookeries or driven from the islands." Report on Fur-seal Fisheries, 44th Cong., 1st Sess., H. R., Ex. Doc. 43, p. 6.

It is only during the course of the present inquiry that the migration routes have been made known, and the question which has been consistently asked of sealers from the earliest times has been answered. With reference to this, Professor Allen, writing in 1880, says:— British Commissioners' Report, para. 171. Professor Allen.

"Of the life of these animals while absent from the islands but little is known, nor is it known where their principal feeding-grounds are." "Monograph of North American Pinnipeds," p. 410.

On another page of the same work he writes:—

"Except during the season of reproduction, these animals appear to lead a wandering life, but the extent and direction of their migrations are not yet well known. . . . . but where they pass the season of winter is still a matter of conjecture." Ibid., p. 335.

While, therefore, it is admitted that, in the absence of precautions such as to prevent excessive disburbance and unlimited killing of seals upon the breeding-islands, these animals might in a few years be practically extirpated or driven

Man's care of seals thus merely negative

His practices on the islands are injurious to the animal.

See pp. 260 *et seq.*

from the islands, it is evident that such precautions are of a purely negative character.

It is further shown that the control and mode of dealing with the fur-seals at the time of driving is not only not beneficial, but is distinctly and in an important degree injurious to the survivors; while the claim advanced in the United States' Case, to the effect that a large number of "surplus males" may be killed with advantage, as in the case of other "domestic" animals, is decisively negatived by observations elsewhere detailed, and particularly by the fact that the fur-seals differ entirely from domestic animals of polygamous habit, in the impossibility in their case of the artificial selection of the stronger and finer males for breeding purposes.

United States' Case, p. 154.

See pp. 238 *et seq.*

No scientific evidence adduced in support of contention that the seal is a domestic animal.

It will be noted that neither the United States' Behring Sea Commissioners, nor Professor J. A. Allen, in their Reports, venture to characterize the fur-seal as a domestic animal, and in fact that Professor Allen, in conformity with facts and usage, distinctly classes it as a wild animal, writing:—

United States' Case, Appendix, vol. i, p. 375.

"The habits of no wild animal during the breeding season are perhaps better known than are those of the Northern or Alaskan Fur-Seal."

United States' Case, p. 150. Ibid., Appendix, vol. i, p. 431.

The sole opinion purporting to be of a scientific kind adduced as evidence, in which the "domestic" character of the fur-seal is affirmed, is that of Dr. E. von Middendorf, of Russia, who writes that the seal "was created for a domestic animal;" but it is very clear that the writer did not appreciate the meaning of the word "domestic." He writes:—

"It is, in fact, the most useful of all domestic animals, *for it requires no care and no expense*, and consequently yields the largest net profit."

Conclusion

It is submitted that there is no just ground for the contention that the seal is domestic in its habits.

SECTION III.—*Intermingling of Fur-seals of different parts of the North Pacific.*

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 89—
"The Alaskan fur-seal."

(2.) United States' Case, p. 94—
"The Alaskan seal herd."

"The two great herds of fur-seals which frequent the Bering Sea and North Pacific Ocean and make their homes on the Pribilof Islands and Commander (Komanderski) Islands, respectively, are entirely distinct from each other."

(3.) United States' Case, p. 96—
"These two herds of fur-seals do not intermingle, each keeping to its own side of Bering Sea and the Pacific Ocean."

(4.) United States' Case, p. 323—
"In winter the fur-seals migrate into the North Pacific Ocean. The herds from the Commander Islands, Robben Reef, and the Kurile Islands move south along the Japan coast, while the herd belonging to the Pribilof Islands leaves Bering Sea by the eastern passes of the Aleutian chain. The fur-seals of the Pribilof Islands do not mix with those of the Commander and Kurile Islands at any time of the year."

(5.) United States' Case, p. 296—
"That its [the fur-seal's] course when absent from these islands is uniform and confined principally to waters adjacent. That it never mingles with any other herd. . . . . That at all times when in the water, the identity of each individual can be established with certainty, and that at all times, whether during its short excursions from the islands in search of food or its longer winter migration, it has a fixed intention, or instinct, which induces it to return thereto."

SUMMARY OF BRITISH REPLY.

The word "herd" is applicable to seals (if at all) only when on the islands, and then only to each rookery separately, or to bodies of seals driven together. It is entirely incorrect and misleading when applied, as in the United States' Case, to an indefinite portion of the fur-seals of the North Pacific, there entitled "the Alaskan seal herd."

No distinction, as between the fur-seals resorting to the two sides of the North Pacific, has heretofore been known to naturalists; and the distinction now for the first time endeavoured to be established in the Case of the United States is wholly unsupported by naturalists.

The alleged distinction is based on the classing of skins by fur-dealers; but such classing and the differences of price resulting, are no evidence of difference of kind in the fur-seal or in other animals.

The criteria employed by fur-dealers in classing the skins, though important in the trade, are in themselves slight and difficult of definition, and the evidence given in the Case of the United States on this point is conflicting. In the particular case of skins from the Pribyloff and Commander Islands, experienced dealers actually observe a large percentage of skins from each source which would be classed according to quality as coming from the other.

The intermingling of fur-seals frequenting the two sides of the North Pacific is *per se* probable. It must at one time have occurred, and no reason can be assigned for its alleged cessation.

Such intermingling is either admitted to be probable, or is asserted to occur, by many of the officials on the Pribyloff Islands during twenty years past. It has not been denied till now in the Case of the United States. Intermingling is shown by actual experiment to have occurred as between the Islands of St. Paul and St. George.

The evidence quoted in the Case of the United States is alone sufficient to show that fur-seals from both sides of the Pacific intermingle, during the summer, in the vicinity of the Aleutian Islands.

Further evidence, now adduced, shows that intermingling occurs between the seals of the North Pacific generally, both to the north and to the south of the Aleutian Islands.

The proposition that the identity of individual seals can be established when at sea, is absolutely unsupported by evidence.

Meaning and object of contention of United States.

Taking the statements made in the above quotations from the United States' Case, it would appear that the position sought to be maintained in this matter may be outlined as follows :—That there is a distinctively "Alaskan seal herd" which never mingles with other fur-seals. That the identity of each animal can at all times be established with certainty in the water. That the course of the "Alaskan herd" is uniform when absent from the breeding-islands, and is confined principally to waters adjacent to the coasts of the United States, and that at all times the seals have a fixed intention of returning to the Pribyloff Islands.

The burden of proof of these general propositions devolves upon the United States. The position indicated is assumed in order to support the theory of an exclusive property in fur-seals. Great importance is apparently attached to it, for it is not only advanced in the opening pages of the lengthened discussion on the conditions of seal life, but is frequently reiterated.

Erroneous use of the word "herd."

Before entering into any detailed examination of the subject dealt with in this Chapter, it is desired to draw attention to the use here and elsewhere made of the word "herd" as applied to the fur-seals of the eastern part of the North Pacific. This, it is submitted, is a term which connotes characters entirely foreign to the known habits of the animal. If at any time possible to describe the fur-seals as forming a "herd," this can only be when it is found aggregated upon the breeding-islands; and even then, in any recognized use of the term, it could be made to apply only to any individual breeding-rookery or hauling-ground, of which upon the Pribyloff Islands alone there are many.

Term wholly inapplicable to fur-seals of Eastern Pacific.

It is therefore simply an abuse of language to apply this single term even to the seals when upon the numerous and separate breeding colonies of the Pribyloff Islands, and much more so to attempt to denote by it the same animals when, during the greater part of each year, they are found to be scattered over an extent of ocean which stretches from the vicinity of the Pribyloff Islands to the coast of California—some 3,000 miles—and, to a lesser extent, from one side of the North Pacific to the other. No evidence has been adduced such as to warrant the use of this term, and the justification of its employment will be sought in vain in the facts brought forward in the Reports of the Commissioners of either the United States or Great Britain.

See Captain Bryant's opinion, British Case, p. 108. British Commissioners' Report, paras. 209, 221, 222.

Naturalists draw no distinction between fur-seals of two sides of North Pacific;

As bearing upon the general contention above stated, it may in the first place be pointed out that naturalists generally, including those who have devoted special attention to the subject, and who have been most critical and minute in their work of comparison and separation, have up to the present time found no reason to draw any distinction between the fur-seals taken in the eastern and western parts of the North Pacific. The seals so found have been universally included under a common specific name, and no difference even of a sub-specific order has been found to be tenable as between them. Thus, after referring to the comparative want of knowledge of the otaries of the Southern Hemisphere, Professor J. A. Allen writes:—

Though these have long been well known.

"Those of the Northern are much better known, the only doubts still existing having relation to those of Japan. Respecting all the others, there has been for the last eight years an almost perfect unanimity of opinion, so far as the question of species is concerned."

"Monograph of North American Pinnipeds," p. 205.

Naturalists differ in opinion whether the fur-seals of the North Pacific should, or should not, be classed as generically different from those of the Southern Oceans, and in consequence of this difference of opinion, the names *Otaria ursina* and *Callorhinus ursinus* have been employed to denote the North Pacific Fur-seals collectively. By naturalists generally, moreover, the animal in question is referred to as the "Northern fur-seal," or "fur-seal of the North Pacific" (see Flower and Allen, as cited in the margin), and not as the "Alaskan" fur-seal. The United States' Commissioners, in their Report,

Sir W. H. Flower, "Encyclopædia Britannica," vol. xv, p. 443; British Commissioners' Report, Appendix, p. 186. Professor J. A. Allen, "Monograph of North American Pinnipeds," p. 33; United States' Case, Appendix, vol. i, p. 372.

United States' Case, p. 319.

have, however, invented still another name, viz., "Bering Sea fur-seal."

The attempt, therefore, in the course of the arguments now produced, to evolve a new and special name for application to those fur-seals found in the eastern part of the North Pacific, and to denote them as a "herd," must be considered as singularly unfortunate.

United States' Commissioners and Professor Allen admit specific identity.

The United States' Behring Sea Commissioners state that the fur-seal of the North Pacific constitutes but a single species, writing:—

Ibid., p. 322.

"The Northern fur-seal (*Callorhinus ursinus*) is an inhabitant of Bering Sea and the Sea of Okhotsk, where it breeds on rocky islands. Only four breeding colonies are known, namely, (1) on the Pribilof Islands, belonging to the United States; (2) on the Commander Islands, belonging to Russia; (3) on Robben Reef, belonging to Russia, and (4) on the Kurile Islands, belonging to Japan."

Professor J. A. Allen similarly characterizes the "Northern fur-seal" as a whole, as constituting a single species; and omitting all reference to the existence of the breeding-places on Robben Reef and the Kurile Islands, defines its habitat as—

Ibid., Appendix, vol. i, p 372.

"the islands in Bering Sea; at present chiefly the Pribilof and Commander Islands, migrating southward in winter along the American coast to California, and along the Asiatic coast to the Kurile Islands."

The fur-dealer is depended on as proving distinction drawn in United States' Case.

In order, however, to establish the constant difference which it is considered necessary to prove as between the seals found on the two sides of this ocean, not the skilled naturalist, but the fur-dealer and furrier, are chiefly appealed to in the United States' Case. It will, therefore, be appropriate in the first place to examine the nature of the evidence obtained from such sources.

But skins of same animals taken in different surroundings frequently possess different commercial values.

It is a fact very well known and widely recognized, that skins even of the same animals taken in different localities under different conditions of climate, and differently handled and cured, are classified very differently from a commercial point of view. This applies to skins of almost all kinds, but is specially noteworthy in the case of such fur-bearing animals as the otter, mink, marten, and beaver.

Examples of this.

See also Appendix, vol. ii, p. 239.

Thus in the Hudson's Bay Company's fur sale of March 1891, No. 1 marten skins from Fort George, &c., were sold at 23*s.* to 24*s.*, from East Main 20*s.* to 20*s.* 6*d.*, from York Factory at 13*s.*,

from "North-West" at 12*s.* 6*d.* to 12*s.* 9*d.*, and from Mackenzie River District at 11*s.* 6*d.* Similarly, and at the same Company's sale in January 1892, No. 1 beaver-skins from Fort George sold at 62*s.*, from Moose River and East Main at 45*s.* 6*d.* to 47*s.*, from York Factory at 39*s.* 6*d.* to 41*s.*, and from Mackenzie River District at 33*s.* 6*d.*

Commercial values thus depend on slight differences in fur, not on constant differences of kind.

Such differences in value depend of course upon differences of colour, density of the fur, texture, &c., observed in the skins as brought to market, the above comparisons being in all cases made between No. 1 skins from each district. They are similar in proportionate amount to those quoted in reference to the Alaska and Copper (Commander) Islands fur-seal skins.* They occur in this instance, in each case, in animals of the same kind, inhabiting the single connected land area of the northern part of North America, in which intermingling and interbreeding must be continually in progress.

United States' Case, Appendix, vol. ii, pp. 573, 575.

"North-west" and "Alaska" skins are differently defined.

It is further noteworthy, as an index of the amount to which the mode of treating a skin may affect its market value, that the "North-west" skins, being those of seals taken at sea, and belonging, under the contention held in the United States' Case, solely to the same "herd" as those derived from the Pribyloff Islands, are quoted by the same witnesses at about half the price of the latter.

Ibid., pp. 573, 575.

Character of differences of skins adduced in the United States' Case on the evidence of furriers.

The evidence actually adduced in the Case of the United States on this particular matter, and in support of the general contention as to the essential difference between the Pribyloff and Commander Island "herds," may be summarized as follows:—

United States' Case, pp. 94, 95.

Mr. W. E. Martin, who is first quoted, and is most definite as to the differences in the skins, says that there are marked differences between the Copper (Commander) Island catch and that from the Pribyloff Islands. He enumerates these, and adds that they are such as to enable—

"any one experienced in handling skins to distinguish the one from the other;"

United States' Case, Appendix, vol. ii, p. 569.

and—

"that before the skins are dressed the two may be readily distinguished from each other."

* In the trade, the skins of fur-seals derived from the North Pacific region are divided under the names of "Alaskas," "Coppers," and "North-west Catch;" such names respectively implying that the skins come from the Pribyloff or Commander Islands, or are taken at sea, as the case may be.

United States' Case, Appendix, vol. ii, p. 573.

Mr. G. Rice says that the differences are—

"such as to enable any person skilled in the business"

to distinguish them; but adds—

"The manner in which the skins are distinguished is difficult to describe to any person not accustomed to handling skins."

He further only professes to distinguish the skins—

"in the raw state."

Ibid., p. 557.

Alfred Fraser, though referred to in this connection, professes only to be able to distinguish North-west catch from "Copper" and Pribyloff catch collectively. He does so by means of the shot and spear marks found in the skins of the seals taken at sea.

Ibid., pp. 551, 552.

H. S. Bevington holds that the difference is such as to enable any one skilled in the business to distinguish the skins, "especially in bulk." He further adds, however, that the skins reach the market in separate lots, and are not found mingled. He admits that the difference is—

"difficult to describe to a person unaccustomed to handle skins."

Ibid., p. 575.

W. C. B. Stamp says that the differences are—

"difficult to describe so that they can be understood by any person who has no practical knowledge of furs."

Ibid., pp 580, 581.

E. Teichmann says that he could easily separate the Commander Island and Pribyloff Island skins, but that as a matter of fact they are not mingled. In the case of very young animals, however, the differences are not well marked.

Actual methods of distinction relied on are contradictory.

Several of the gentlemen quoted in this connection, and whose evidence is given at length in the Appendix to the United States' Case, offer no explanation of the grounds upon which they rest in distinguishing the skins derived from the Pribyloff and Commander Islands respectively, while those who do, appear to rely chiefly upon the colour. But great differences of opinion occur in respect to this.

Dealers differ among themselves.

Ibid., pp. 569, 552, 571, 521, 508, 519, and 586.

Thus, W. E. Martin states that the hair on the Commander Island skins has a *yellower tinge*; H. S. Bevington and H. Poland, that these skins are *lighter in colour*; while, on the other hand, C. W. Price states that *both fur and hair are darker*; G. Bantle, that the *under wool is darker*; J. J. Phelan, that the *hair is darker*; and E. Teichmann, that the *top hair is darker*.

Again, Messrs. C. W. Martin, J. J. Phelan, G. Leibes, H. S. Bevington, H. Poland, and

E. Teichmann state that the fur in the Commander Island skins is *shorter*; some, however, making the statement general, and others confining it to particular parts of the skin; while Sneigeroff, the native foreman in charge of the Behring Island rookeries (who has also had experience in the Pribyloff Islands), states that both the hair and fur of the Commander Island seals is *longer*.

Further evidence adduced in this Counter-Case.

Apparently the only general points of difference, in which all the witnesses who mention them practically agree, is that the Commander Island skins, as received, are narrower toward the neck and flank, and have been on the average smaller than those from the Pribyloff Islands.

A list of all the leading buyers of seal-skins in the world is given in the United States' Case, Appendix II, p. 566. They are thirty-nine in number. Of these, as many as possible have been seen, and thirty have actually been interviewed, and their opinions have especially been requested on the subject of the allegeddifferences between skins from the Commander Islands and from the Pribyloff Islands, with the result that they are unanimous in saying that the only differences which exist are that the fur of the Pribyloff skin grows somewhat closer or denser, that the sizes of Pribyloff consignments run a little larger, and that the flaying and curing in their case is better performed; that these are the distinctions which produce the difference of price; that, concerning the other alleged variations: as to colour, they have noticed that Coppers were lighter on the average, but that Alaskas have been at times the lighter; that as to shape of skin and the length of fur, they either deny any difference or say it is too trivial for notice.

Appendix, vol. ii, pp. 230–253.

Differences so slight that skins from Commander and Pribyloff Islands not separately catalogued till 1887.

It is also a noteworthy circumstance that Messrs. Lampson and Co., who, as London agents of the lessees of both the Pribyloff and Commander Islands, dispose of all seal-skins taken on both groups of islands, up to the year 1887 made no distinction in sale catalogues between Pribyloff Island and Commander Island skins. In that year, for the first time, the words "Alaska" and "Coppers" were printed on the catalogues, and since that time also a separate catalogue is produced by Messrs. Lampson for each description. Prior to that date, in March each year, "Alaskas" and "Coppers" were sold in the same catalogues without any distinction being made on the face of the catalogues.

Opinions of pelagic sealers.

Appendix, vol. ii, pp. 35–38.

The testimony of the more experienced sealers, who have hunted on both sides of the North Pacific, is also generally to the effect that the seals and seal-skins are undistinguishable; while, when any difference is referred to, it is in regard to depth of colour of fur only; some claiming that seals on the Asiatic side are darker, while others say lighter, than those on the American side. Such differences met with in individual catches might very well depend on the different seasons of the year in which these were made.

Causes assigned for differences of skins.

British Commissioners' Report, para. 455.

Sneigeroff, already quoted, attributed the differences which he has noted solely to the longer residence ashore of the Pribyloff seals, and added that the seals of Robben Island, in Okhotsk Sea, have even longer hair and wool than those of the Commander Islands.

That the Alaska Commercial Company, which, for many years, was the lessee of both the Commander and Pribyloff Islands, believed the lower prices obtained for the skins from the former were due to inferior methods of treatment, is shown by the fact that they at one time sent their most experienced foreman (Webster) from the Pribyloff to the Commander Islands to improve the method of handling the skins there.

Indefinite and novel opinions as to separation of seals of two sides of Pacific, relied on in United States' Case.

The passages in the United States' Case above noted, are all those which profess to give direct evidence, based on differences in character of the skins, as to the alleged complete distinctness of the seals resorting for breeding purposes to the Commander and Pribyloff Islands respectively. The *opinions* of a number of persons are subsequently quoted, but on referring to these, as given in the Appendix to the United States' Case, it will befound that such opinions are not the result of any personal investigation of the actual facts, and are, indeed, chiefly based on the different market values quoted for the two classes of skins, a circumstance which has just been explained.

It will further be noted that all the opinions in question have appeared for the first time in connection with the present Case, and date from a very late period in the discussion of the Behring Sea question, being subsequent to the assertion of a claim to a right of property in seals; and that no such separation of the fur-seals frequenting the two sides of the North Pacific has heretofore been asserted.

Previously published opinions of United States' authors and officials on intermingling of North Pacific seals.

As against the opinions thus now advanced in the United States' Case, some examples of published statements on the same subject, derived from official documents of the United States, and showing a belief in the intermingling of seals from the two groups of islands, are here given.

Such interchange of seals between the various breeding-places may be supposed to occur in two ways: first, in correspondence with natural and casual events, such as winds, currents, and the pursuit of food fishes; second, in consequence of the disturbance of the breeding-places by man. On the latter point, Scammon, in his well-known work (p. 152), sums up the result of his observations as follows:—

Captain Scammon.

"We may add, likewise, from our own observation, and as the expressed opinion of several experienced sealing masters, that their [the seals'] natural migrations extend over a great expanse of ocean; and if they are unduly disturbed in their favourite haunts for several successive seasons, they are quite sure to seek some distant and unknown place where they can congregate unmolested by man."

Scammon's "Marine Mammalia," p. 152.

Strictly in accordance with the statement made by Captain Scammon is the fact, alluded to in the Report of the British Commissioners, that, as a result of the excessive slaughter and disturbance occurring on the Pribyloff Islands at the time of their cession to the United States, unprecedented numbers of seals were found frequenting the shores and inlets of the coast of British Columbia.

British Commissioners' Report, paras. 422, 423.

A further reference, with the same meaning, is found in the following passage from Dr. Dall's work on Alaska:—

Dall's Alaska, p. 496.

"The number of the seal had greatly increased up to 1868, but in that year not less than 50,000 were killed on St. George's, and 150,000 on St. Paul's, by the traders. At this rate they would soon be exterminated or driven to the Kurile or Commander Islands."

Mr. Elliott.

Mr. Elliott, in his Report, after asking a question as to the possible accessions of seals to the Commander from the Pribyloff Islands, replies to his own interrogation as follows:—

Census Report, p. 69.

"Certainly, if the ground on either Bering or Copper Island, in the Commander group, is as well suited for the wants of the breeding fur-seal as is that exhibited by the Pribilov Islands, then I say confidently that we may at

any time note a diminution here, and find a corresponding augmentation there; for I have clearly shown, in my chapter on the habits of these animals, that they are not so particularly attached to the respective places of their birth, but that they rather land with an instinctive appreciation of the fitness of that ground as a whole."

44th Cong., 1st Sess., H. R., Ex. Doc. No. 83, pp. 265 *et seq.*

The same writer, in his "Report on the Condition of Affairs in Alaska," 1875, under the heading "Thoughts upon Possible Movements of the Fur-seals in the Future," treats the subject at some length, reaching very similar conclusions, and adding:—

"It is not unlikely that some season may occur when an immense number of the fur-seals which have lived during the last four or five years on the Pribilov Islands should be deflected from their usual feeding-range by the shifting of schools of fish, &c., so as to bring them around quite close to the Asiatic seal-grounds in the spring, and the scent from these rookeries would act as a powerful stimulant for them to land there, where conditions for their breeding may be as favourable as desired by them."

Mr. Miller.

In a Report on an investigation on the Alaska Commercial Company by a Committee of Congress, dated 1876, Mr. J. F. Miller, President of the Company, says that the seals upon the Pribyloff Islands—

44th Cong., 1st Sess., H. R. Report 623, p. 45.

"maintain just about the natural increase very regularly; they do not seem to migrate."

But in reply to a further question as to whether they were not supposed at a former period to have been driven from the Pribyloff Islands to the Commander Islands, adds:—

"They no doubt were at one time. Some of them went over there, and where the others went we do not know, because they do increase upon the Russian islands; so history shows."

Mr. Buynitzky.

In a Congressional Report on the "Fur-seal Fisheries of Alaska," dated 1889, Mr. S. M. Buynitzky, Government Agent on the Pribyloff Islands, gives the following evidence:—

50th Cong., 2nd Sess., H. R. Report 3883, p. 15.

"*Q.* What, in your judgment, from your experience of that business in these islands, would be the effect of opening up the business, that is, removing the restrictions so that everybody could go in there and kill fur-seals?—*A.* The probable effect would be to drive the seals from these islands to the Russian group.

"*Q.* That is, driving them from the American islands over to the Russian islands?—*A.* That is the most probable effect. That was conceded at the time by all who studied the question. Secretary Boutwell knew that very well."

Mr Tingle.

Mr. Geo. R. Tingle, long connected with the Pribyloff Islands in different capacities, also said before the same Committee:—

50th Cong., 2nd Sess., H. R. Report 3883, p. 164.

"*Q.* What will be the effect if more stringent measures are not taken to protect the seals by the Government?—*A.* If more stringent measures are not taken, it is only a question of time when these seals will be driven ultimately to seek some other home where they will not be molested. They will not continue to be harassed; and if this marauding is continued, they will, in my opinion, either be gradually exterminated or will leave the islands permanently and land at some other place. They may go on the Russian side."

Mr. Williams.

In the same Report Mr. C. A. Williams, one of the Directors of the Alaska Commercial Company, makes the following statements, which, though now known not to be entirely correct in so far as they appear to relate to the *origination* of rookeries on the Commander Islands, are worthy of quotation:—

Ibid., pp. 77, 78.

"It was supposed at that time [early in the Russian régime] that the commencement of seal life on the Islands of Bering and Copper probably took place by reason of the indiscriminate killing on those islands, [Pribyloff] diverting the seal from their usual haunts and making them seek some other localities.

"*Q.* Was there a large number of seals which left the Pribilov group and went over to the Russian islands?—*A.* You could hardly expect them to go in a body. There had hardly been sealing or seal life to any extent on the Commander Islands or Copper and Bering. It had not attracted the attention of the Russians, but after the indiscriminate killing on the Islands of St. Paul and St. George, it was noticed that seal-life increased rapidly on the other islands, and the supposition is a natural one that they were diverted from the islands on which they had heretofore been undisturbed and sought other places."

United States' Case, Appendix, vol. ii, pp. 537, 544

The statements made by Mr. Williams to the Congressional Committee of 1888 differ very widely from that made in his deposition of the 2nd April, 1892.

In this latter he says:—

"There is no intermingling of the herds, and the skins of the two herds of the Pribilof and Commander Islands may be so readily distinguished from each other that an

expert would have no difficulty in at once throwing out from the catch taken on the Commander Islands any skins of the Pribilof herd, and *vice versa*; deponent understands from persons who have had long experience in the examination of the living animals that the two herds so differ as to belong to separate species of the same genus, and can readily be distinguished from each other."

The above show a *primâ facie* probability of intermingling.

Thus, the opinions previously published by those who have given the greatest amount of attention to the habits of the fur-seal of the North Pacific, are sufficient to show that there is a general agreement in respect to the *primâ facie* probability of interchange and migration of seals between the principal breeding-places.

The relative proportion of seals found on each of the Pribyloffs vary.

The known fact that the relative proportions of seals found on St. Paul and St. George Islands of the Pribyloff group vary from year to year, is interesting as showing that the animals are by no means averse to change their breeding-places in accordance with circumstances.

It is now generally admitted that the same seals do not return necessarily or even usually to the same breeding-ground year after year. Mr. Elliott quotes an experiment made by the Russians, in which 100 young males were marked at one locality on St. Paul Island. Next year some of the seals so marked were included in the catch from "every part of the island." In 1870, again, a similar experiment was made on the same island, and, respecting the 100 seals then marked, it is said:—

Experiments' proof of intermingling adduced.

Census Report, p. 31.

"Of this number, during the summer of 1872, when I was there, the natives found in their driving of 75,000 seals from the different hauling-grounds of St. Paul up to the village killing-grounds, two on Novastoshnah rookery, 10 miles north of Lukannon [the point at which the seals had been marked], and two or three from English Bay and Tolstoi rookeries, 6 miles west by water; one or two were taken on St. George Island, 36 miles to the south-east, and not one from Lukannon was found among those that were driven up from there."

The same, or a very similar, experiment is referred to by Captain Bryant.

In the Congressional Report on the fur-seal fisheries of Alaska, Dr. H. H. McIntyre likewise states that—

50th Cong., 2nd Sess., H. R. Report 3883, p. 128.

"The seals are found indiscriminately on the two islands; that is, seals born on St. George are found on St. Paul, and *vice versâ*."

Apart from such definite experiments, and

over wider areas where, so far, such experiments have not been possible, information as to changes in the resort of seals as between one and another of the various breeding-islands in the North Pacific, must depend largely upon the opinions of those who have had occasion to study the habits of the seal, and upon the general facts which such persons have noted.

After detailing the above experiments, Mr. Elliott says :—

"These experiments would tend to prove very cogently and conclusively, that when the seals approach the islands in the spring, they have nothing in their minds but a general instinctive appreciation of the fitness of the land, as a whole; and no special fondness or determination to select any one particular spot, not even the place of their birth."

United States' Census Report, p. 31. See also 44th Cong., 1st Sess., H. R. Report No. 623, pp. 82, 83.

He then proceeds to point out that the smell of the rookery-grounds constitutes probably the chief incentive to landing.

The evidence of the fur merchants already referred to, is also of considerable importance in this connection, and goes far to demonstrate beyond doubt that there is both intermingling and interbreeding between the seals frequenting the Pribyloff Islands and those frequenting the Commander Islands, as the following extract will show. William C. B. Stamp, the head of a fur house established seventy years, and a man with thirty years' experience in the fur-seal business, states as follows :—

The evidence of fur-dealers conclusively proves intermingling of seals of both sides of the Pacific.

"In my opinion there is no absolute line of demarcation between the Copper Island skins and Alaskas, and in inspecting the consignments made each year from the Pribyloff Islands through Messrs. Lampson and Co., I have found a certain percentage of skins, which were fac-similes of Copper Island skins, and in the same way in inspecting consignments of Copper Island skins, I have seen skins which, had I seen them elsewhere, I should have classed as Alaskas, and also a certain number of the intermediate degrees of similarity."

Appendix,, vol. ii, p. 245.

This evidence is corroborated by twenty-nine of the principal dealers in fur of the world; and one of them, Mr. Henry Poland, who, besides being a member of a fur house established 108 years, is a naturalist, and the author of a work on "Fur-bearing Animals," makes the following statement :—

"That in the differences I have observed between the Alaska and Copper Island seals, there are not the slightest

Ibid., p. 250.

grounds which would lead one to infer that they were a distinct species, the variations of climate, food, &c., would be, in my opinion, sufficient to account for the differences I have mentioned.

"In saying this, I speak from the point of view of a Naturalist as well as from that of a merchant, and I am of opinion that the seals from the Pribyloff Islands must often migrate to the Commander Islands, and *vice versâ*. A seal would soon lose the differences in the changed surroundings."

And even indicates its amount.

Nine of the fur merchants give estimates of the number of seals of each class found among consignments of the other class, and state that this amount varies from 20 to 40 per cent.

Thus, the existence of a slight average difference recognized by fur-dealers in their classification of skins, may be employed as the means of showing the existence, and to a certain extent even the amount, of the intermingling. It is, moreover, quite in accordance with the known facts of geographical distribution to find, in different portions of the range of the same animal, a preponderance of individuals tending toward some difference in size, colour, or other characters, which do not become absolutely peculiar to the district, or constant, unless in the event of the creation of some impassable barrier.

"Island Life," Wallace, 1890, pp. 58, 60.

Professor Allen bases argument in support of United States' contentions on evidence of fur-dealers.

In further support of the theory now endeavoured to be upheld by the United States, according to which there are entirely distinct seal "herds" resorting respectively to the Pribyloff and Commander Islands, and never commingling to the slightest extent, Professor J. A. Allen (as already mentioned) is also brought forward. In his Report specially prepared in support of the Case of the United States, he writes :—

United States' Case, Appendix, vol. i, p. 406.

"As yet, expert naturalists have been unable to make a direct comparison of the two animals [*i.e.*, the fur-seals resorting to the two groups of islands], but the differences alleged by furriers as distinguishing the representatives of the two herds point to their being separable as sub-species, in other words, as well-marked geographic phases, and thus necessarily distinct in habitat and migration."

Professor Allen does not speak from personal knowledge, even of the kind possible from the examination of salted skins, but is guided by the commercial classification of the skins by furriers, of which the nature and scope has already been pointed out. He has not expressed any similar

opinion in previous scientific writings on the fur-seal and its congeners. On this occasion, however (and it is this passage which is incorporated with the Case of the United States), he writes further as follows:—

"The Commander Islands herd is evidently distinct and separate from the Pribilof Islands herd. To suppose that the two herds mingle, and that the same animal may at one time be a member of one herd and at another time of the other, is contrary to what is known of the habits of migrating animals in general."

United States' Case, p. 96.

It would thus appear that Professor Allen endeavours to reinforce arguments derived from the trade classification of skins by an appeal to a certain so-called established principle of Natural History. But elsewhere in the previous scientific writings of the same author, ample evidence is found that the principles which he seeks now to apply so rigorously to the fur-seal of the North Pacific, did not prevent him from supposing that this animal frequented the coast of California for breeding purposes, as well as the Pribyloff Islands. In like manner he does not seek, even in the special article annexed to the Case of the United States, to prove that the walrus, the harbour-seal, or the sea-lion frequenting opposite sides of Behring Sea do not intermingle; nor does the application of any such principle lead him to deny that Steller's sea-lion equally resorts to Behring Sea and the coast of California, there overlapping the range of a totally distinct species of sea-lion; and breeding in both places, as well as on intermediate stations of a suitable character. This is, however, a well-known fact, which may be verified by reference to Allen's Monograph.

He endeavours to support this by an appeal to general propositions.

But does not consistently apply these in other cases.

The United States' Commissioners are also referred to on this point in the Case of the United States. They write:—

The United States' Commissioners likewise adduce theoretical arguments, not the result of personal observations.

Ibid., p. 96.

"The fur-seals of the Pribilof Islands do not mix with those of the Commander and Kurile Islands at any time of the year. In summer the two herds remain entirely distinct, separated by a water interval of several hundred miles; and in their winter migrations those from the Pribilof Islands follow the American coast in a south-easterly direction, while those from the Commander and Kurile Islands follow the Siberian and Japan coasts in a south-westerly direction, the two herds being separated in winter by a water interval of several thousand miles. This regularity in the movements of the different herds is in

Ibid., pp. 323, 324

obedience to the well-known law that *migratory animals follow definite routes in migration, and return year after year to the same place to breed.** Were it not for this law there would be no such thing as stability of species, for interbreeding and existence under diverse physiographic conditions would destroy all specific characters."

The Commissioners then again refer for proof to the trade differences made in classing and selling the skins.

It will be noticed that in this case, as in that of Professor Allen, no personal knowledge is claimed, and it is indeed known that the United States' Commissioners never visited the Commander Islands. Neither are any authorities quoted, with the exception of the general allusion above made to the furriers' classification of skins. The whole statement is, in fact, a mere assertion, which it is endeavoured to support by reference chiefly to a "well-known law" of natural history.

Character of a "law" of Natural History.

The "laws" of natural history in reality embody merely the purport of the majority of the facts observed. Further observations may result in the essential modification of such laws, which, while it is admissible to refer to them by way of analogy, cannot be employed as destructive of observations of fact. The existence of some recognized difference between the seals frequenting the two sides of the North Pacific, might be such as to justify a reference to the law here spoken of by way of explanation. But it may be pointed out that there is here no difference of a specific kind requiring explanation, nor even any proven constant varietal differences; and that the very absence of such specific difference, in accordance with the law invoked, goes far in itself to prove that intermingling and interbreeding has been at least sufficiently constant to prevent any such specific diversity from arising. In other words, the natural consequences resulting from separation are not observed.

Absence of specific difference shows intermingling.

Character of local differences found in all animals.

"Island Life," Wallace, 1890, p. 60.
"Animal Coloration,' Beddard, 1892, pp. 19, 42, 48.

That local differences in animals of the same kind occur in consequence of diversity in climate, food, and the environment generally, is well known; and this has already been shown to be the case in the matter particularly of the skins of certain fur-bearing animals. Such changes, moreover, often result in a short time, even in the lifetime of an individual or during a single change of coat; but that in ordinary case they can be depended on as a means of distinguishing

* The *italics* are in the original.

animals belonging to localities which are not only separated by no impassable barriers, but are situated within an area of which all parts are equally favourable to its existence, is entirely denied.

The highly technical character of the arguments used by the principal authorities quoted in support of the contention of the United States as to the rigid separation of the seals frequenting the Pribyloff and Commander Islands respectively into two "herds," would necessitate, for their discussion in detail, a reference to so many authorities, and to so large a body of literature, as to render such discussion quite inappropriate in this Counter-Case. They appeal to such laws as those of the distribution of allied species in separate areas, and those of animal migration, rather than to the facts in respect to the fur-seals which are here more directly in point.

Fur-seals of the North Pacific originally from a common source.

It is, however, perfectly obvious, under any hypothesis, that the fur-seals of the two groups of islands (between which it is now attempted to draw what, it is submitted, is a purely arbitrary line) must originally have reached these islands either from some common source or by traversing the waters between the islands themselves. It is not alleged in the Case of the United States that they were separately created on the several islands.

No reason can be assigned for interruption of communication.

There is at the present time no barrier whatever, either of land, or such as might arise from the temperature of the water or of the air, to render it difficult for seals from one of these groups of islands to reach the other group; but, on the contrary, all the circumstances are such as to afford the greatest facility for such intercommunication by marine animals. There is therefore no assignable reason, either of a practical or of a theoretical kind, why such intercommunication as *must* at one time have existed should have ceased to-day.

But it is unnecessary to rely upon abstract principles, or on the more or less valid deductions from these, to which an appeal is chiefly made on the point here under discussion in the Case of the United States. It is of course quite impossible to follow out the courses of individual seals at sea; but in addition to the opinions quoted on a previous page, from persons more or less familiar with seal life in the North Pacific, a considerable body of evidence respecting the

Evidence quoted in the Case of the United States is alone sufficient to show that intermingling must occur.

United States' Case, p. 97.

actual distribution of the fur-seal at sea has now been collected.

Thus, even in the Case of the United States, it is stated only that "between parallels [*sic*] 171° west and 175° east seals are *seldom* seen;" or, in other words, that seals are seldom seen in the vicinity of a middle part of the length of the Aleutian chain, about 420 miles in length. Taking into consideration the pelagic habits of the seal, the vast extent of its range throughout the Pacific, and the fact that it often wanders far in pursuit of food fishes while at sea, the statement thus made, even if established, would only go a very small way towards proving the absence of intermingling in this particular region. As a matter of fact, the statement is erroneous.

Ibid., Appendix, vol. i, p. 406.

In the evidence quoted by the United States on this point, it is elsewhere shown that seals which are *supposed* to belong to the Commander Islands have been noticed in the same region to a point 30 miles east of the Semichi Islands, in the Aleutian chain; while others *supposed* to belong to the Pribyloff Islands have been similarly observed at Amchitka Island, the distance intervening being only about 140 miles; which, in the case of an animal constituted as the seal is, may be regarded as practically obliterating the gap in distribution upon which it is endeavoured to insist in the Case of the United States.

Ibid., Appendix, vol. ii, p. 215.

Negative evidence proves nothing.

United States' Case, pp. 96, 97, and Appendix, vol. ii.

Most of the evidence quoted in the United States' Case on this subject is purely negative in character, being to the effect that certain individuals did not see fur-seals when making voyages along the Aleutian Islands, or between San Francisco and Unalaska. As the witnesses cited were not looking for seals, and are therefore scarcely likely to have observed or noted them unless in large numbers, their evidence can be considered as of but little real value; though some of the seamen express the *opinion* that the seals from the two sides of the Pacific do not mingle.

United States' Case, Appendix, vol. ii, pp. 205, 207, 210.

The evidence of some natives is also offered, but it will be found on examination to be of a vague and indefinite character, and when the language in which the declarations are expressed is scrutinized, it is difficult to believe that they are a correct reproduction of the expressions used.

Statements by the British Commissioners from investigations in 1891.

A discussion of the ascertained facts relating to the distribution of the fur-seal at sea, and

on the commingling of those of the two sides of the North Pacific, will be found in the Report of the British Commissioners, who personally investigated these matters by cruizing along the whole chain of the Aleutian Islands and visiting the Commander Islands.

British Commissioners' Report, paras. 209–223, 451, 457.

The result of their inquiries is shown in the Maps accompanying their Report, and they write:—

Ibid., Diagrams Nos. II, III, and IV.

"The comparative proximity of the breeding-islands frequented by the seals pertaining to these two migration tracts during the summer insures a certain interrelation and interchange of seals between the two groups, to an extent not fully known, and which doubtless varies much in different years."

Ibid, para. 27.

While expressing themselves as unable to observe any general difference as between the appearance of the seals seen by them on the two groups of breeding-islands, they quote evidence to show that some such slight difference, whatever its cause, probably does exist, and add:—

"The amount of interconnection between the two groups is doubtless, however, sufficient to prevent any very striking or permanent peculiarities, even of a varietal rank, to grow up."

Ibid., para. 456.

In conclusion, the Commissioners write:—

"Some evidence not without importance in this connection is afforded by a comparison of the diagrams elsewhere given, and representing the number of seals killed each year on the two groups of islands. Though affected by other causes as well, this number may be taken in a very general way as a record of the state of the rookeries as a whole, and the correspondence of the lines in the two diagrams is thus significant of connection or of co-operating causes."

Ibid., Diagram No. V.

Conclusive local evidence since obtained.

Since the date of the Report of the British Commissioners, information obtained from pelagic sealers and seamen engaged in navigating in various parts of the North Pacific has resulted in the accumulation of an overwhelming amount of evidence supporting the position that no constant separation exists between the seals frequenting the two sides of this ocean.

Intermingling both to the north and south of the Aleutian Islands.

Many of the sealing-vessels within, the last few years, have sailed through Behring Sea from the vicinity of the Pribyloff Islands to that of the Commander Islands, on the Asiatic side, during the summer months. Their evidence is, that on

such voyages seals have been observed on every fine day during the passage. It would be inappropriate to include these statements at length in this place, and reference is therefore made to the Appendix, where the statements of no less than 57 hunters and seamen will be found who give evidence upon the point.

Appendix, vol. ii, pp. 23-27.

Further, during the summer, and generally in July, a certain number of sealers have crossed from the American to the Asiatic side, to the southward of the Aleutian chain, particularly in 1892, when the *modus vivendi* then in force deterred sealers from sailing through Behring Sea. Similar observations proving the presence of seals in all longitudes to the south of the Aleutian Islands are recorded by a number of these men, whose evidence will also be found in the Appendix. Reference may also be made to the log of the "Triumph" in this connection, where the seals actually killed each day on the way westward are noted.

Ibid., pp. 27, 28.
Ibid., p. 208.

Many of the sealers who have frequented the Asiatic side of the Pacific, and particularly the region in the vicinity and to the south of the Commander Islands, returned in the autumn to the eastward, shaping a course parallel to, but south of, the Aleutian Islands, while others made a direct course to Victoria or to San Francisco. These witnesses also state that seals were seen by them all the way across the ocean on each of the above courses. Their evidence will be found in the Appendix.

Ibid., pp. 27-29.

Intermingling in southern latitudes.

Information has further been obtained showing that during the winter months, in the latitude of the Sandwich Islands, fur-seals are found very widely distributed in the Pacific. This would appear to indicate that, at this season, a considerable number of the fur-seals congregate in the vicinity of banks and islands in that central part of the Pacific, in addition to the greater numbers found during the same season along the British Columbian and Japanese coasts. In respect to these seals it is impossible to say whether they principally resort to the Pribyloff, Commander, Kurile, or Robben Islands during the season of procreation.

Ibid., pp. 25-27.

The evidence on this point will be found in the Appendix.

Ibid., p. 128.

A few degrees north of the latitude just referred to seals were seen by Warren F. Upson, who says :—

"I have crossed from San Francisco to Yokohama many times, and have taken many different courses. In courses made from 35° to 45° have seen seals off and on every day all the way across in January, February, and March."

Captain Adolphe Carlson states that he crossed from Yokohama to San Francisco in the mail-steamer "Gallie," making a course 45° north, and saw seals more or less every day in the month of January. He returned in the beginning of February on a course about 36° north, and again saw seals almost daily during the voyage. Appendix, vol. ii, p. 128.

Mr. J. M. Macoun, while in Victoria in June 1892, was shown a chart on which was marked the track of the sealing-schooner "Mary Taylor," which had been sent to look for fur-seals north of the Sandwich Islands. Her captain reported that in November and December 1891, he had seen seals for six weeks between latitude 30° and 40° north, and in about the longitude of the Sandwich Islands, but that the weather had been too rough to permit of a boat being lowered. Ibid., vol. i, p. 136.

Captain William Grant, quoting from his diary, says that on the 3rd December, 1890, when on the steam-ship "Parthia," in latitude 42° 29′ north, longitude 157° 35′ east, large schools of seals were for several hours seen from the ship. They were heading for the south. When captain of the barque "George" he had on three different trips seen seals at about the same place. Ibid, vol. ii, p. 112.

Captain Marshall, of the mail steam-ship "Empress of India," in voyages between Yokohama and Vancouver, reports having seen great numbers of fur-seals in latitude 40° 41′ north, longitude 143° to 145° west, on the 18th April, 1892; and again on the 19th and 20th May in the same year, between latitudes 38° and 46° north and longitudes 146° and 169° east. Ibid., p. 214.

Intermingling near Behring Strait.

Still further, in connection with the subject of intermingling of fur-seals from the two sides of the North Pacific, Mr. A. C. Folger gives the following statement respecting the occasional presence of fur-seals in the vicinity of Behring Strait, in respect to which it is impossible to decide whether they have arrived there from the eastern or western part of Behring Sea. Mr. Folger says:—

"I have seen Eskimo wearing clothes made of fur-seal skins when north of Behring Straits when trading there, Ibid., p. 90.

and I once saw a fur-seal lassoed when north of East Cape; and on the same cruize the captain in my presence shot a fur-seal from the deck of the vessel, a boat was lowered, and the seal was got. The mate also shot them. I don't know where these seals came from, but am sure that they were fur-seals. I have known fur-seals for nearly twenty years."

Of the remaining allegations made in this connection in the Case of the United States, and recited at the beginning of this chapter, some are subsidiary to the general contentions dealt with above, while others are treated at greater length in subsequent pages. It may here be added, however, that the statement—

Uniformity of migration routes only true in a general way.

United States' Case, p. 296.
United States' Case, Appendix, vol. i, p. 406.

British Commissioners' Report, paras. 26, 209.

"that its [the fur-seal's] course when absent from these islands is uniform and confined principally to the waters adjacent to the coast of the United States,"

is one which can only be admitted with considerable modifications. As a general proposition, the uniformity of the migration routes of the fur-seal is not questioned, but the actual routes followed by the seals at sea are largely influenced by the abundance of food fishes, amongst which the herring appears to be one of the most important, and a reference to any of the published records of herring migrations will show how erratic and apparently inexplicable these often are.

Seals influenced by locality of fish food supply.

The diversity thus met with is quite in accord with that noticed in the case of migratory animals generally, and particularly in that of marine animals with great powers of locomotion.

Winter home of the fur-seal is adjacent to the coast of British Columbia.

As to the second part of the above statement, that the course is confined principally to the waters adjacent to the coast of the United States, it must simply be said that it is incorrect. The evidence personally obtained by the British Commissioners, clearly shows that the principal winter habitat or winter home of the fur-seal in the eastern part of the North Pacific, lies off the coast of the Canadian Province of British Columbia, extending beyond it in latitude only for short distances to the north and south.

British Commissioners' Report, paras. 27, 28, 192, and Map No. II.

The further statement incorporated in the "Conclusions" of the Case of the United States, to the effect—

United States' Case, p. 296.

Statement that seals identifiable in water totally unsupported.

"that at all times, when in the water, the identity of each individual [fur-seal] can be established with certainty,"

is somewhat ambiguous. It would appear, however, to mean that the individuals of the assumed

Pribyloff and Commander "herds" of the United States' Case may thus be distinguished. If so, the allegation made, in so far as can be discovered in the Case of the United States and its appended documents, is unsupported by any evidence.

Conclusions

In conclusion, it is submitted that the assertion that the fur-seals resorting to the Commander and Pribyloff Islands form two entirely and rigidly separated "herds" has been shown to be erroneous.

That, on the contrary, the facts ascertained from a large body of testimony establish that the fur-seals which breed upon the islands on both sides of Behring Sea intermingle.

SECTION IV.—*Relation of the Fur-seals to the Pribyloff Islands. Summer and Winter Homes.*

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 89—

"The Pribilof Islands are the home of the Alaskan fur-seal (*Callorhinus ursinus*). They are peculiarly adapted by reason of their isolation and climate for seal life, and because of this peculiar adaptability were undoubtedly chosen by the seals for their habitation. The climatic conditions are especially favourable. The seal, while on land, needs a cool, moist, and cloudy climate, sunshine and warmth producing a very injurious effect upon the animals. These requisite phenomena are found at the Pribilof Islands and nowhere else in Bering Sea or the North Pacific, save at the Commander (Komandorski) Islands."

(2.) United States' Case, p. 91—

"The Alaskan seals evidently consider the Pribilof Islands as their home, for while on or about them they are much less timid and fearful than when met with in the sea along the American coast."

(3.) United States' Case, p. 123—

"The seals evidently consider these islands their sole home."

(4.) United States' Case, p. 127—

"The seals do not enter the inland waters of the coast during their migration."

(5.) United States' Case, p. 295—

1. "That the Alaskan fur-seal, begotten, born, and reared on the Pribilof Islands."
2. "That the only home of the Alaskan seal herd is on the Pribilof Islands; that it resorts to no other land."

(6.) United States' Case, p. 300—

"First. That, in view of the facts and circumstances established by the evidence, it [the United States' Government] has such a property in the Alaskan seal herd as the natural product of the soil, made chiefly available by its protection and expenditure, highly valuable to its people and a considerable source of revenue, as entitles it to preserve the herd from destruction, in the manner complained of, by an employment of such reasonable force as may be necessary."

SUMMARY OF BRITISH REPLY.

It appears from the Case of the United States, that the term "Alaskan fur-seal" is intended to designate all fur-seals found in the eastern part of the North Pacific. While it is admitted that the greater part of these seals are now born upon the Pribyloff Islands, it is shown that seals formerly resorted to various places on the west coast of North America, and elsewhere, for the purpose of bringing forth their young; and that they probably still do so in reduced numbers. The fact of intermingling between the seals of both sides of the North Pacific, likewise shows that not all the seals found in the eastern part of that ocean can have been born on the Pribyloff Islands.

The precise locality in which seals may be begotten appears to be unimportant in connection with any argument respecting property in seals; but it is certain that coition frequently occurs at sea.

It is in consequence of the isolation of the Pribyloffs, their originally uninhabited character, and the consequent freedom from disturbance found there, rather than of any peculiar climatic or physical characters, that these

islands have become chief resorts of the fur-seal at the breeding season. Similar climatic and physical features are to be found in many other places in the North Pacific.

The statement that the fur-seals might remain in the vicinity of the Pribyloff Islands throughout the year if the winter were less rigorous, is unimportant; for their stay is admitted, under the actual circumstances, to be impossible.

The expression "home" or "sole home," as applied in the Case of the United States to the Pribyloff Islands, in connection with the fur-seals found in the eastern part of the Pacific, even on the assumption that all are born there, is inadmissible. A migratory animal cannot be said to be "at home," only when in its breeding area. The home of any species is the area over which it habitually lives. Animals may have winter as well as summer homes, as stated by Dr. Merriam and other naturalists.

The principal "winter home" of the fur-seals of the eastern part of the North Pacific, is that part of the sea lying off the coast of British Columbia; and there enormous quantities of food fishes, which would otherwise be available for the support of the inhabitants, are consumed by the seals; which even enter the inner waters along the coast and prey upon the food fishes there.

Some of the assertions above formulated have already been in part dealt with, being to a certain extent involved in other contentions brought forward in the United States' Case in regard to seal life.

It has been shown that the term "Alaskan seal herd," as employed in the Case of the United States, is intended to denote all the fur-seals found in the eastern part of the North Pacific. Most of these seals are doubtless born upon the Pribyloff Islands, and the young remain on and about these islands till such time as their size and strength enables them to permanently assume their natural pelagic habits. After leaving the islands, they appear to remain entirely at sea till at least the middle of July in the next year. In regard to the fur-seals of the Southern Hemisphere the young animals never again come on shore during the first year of their lives, and there is much reason to believe that similar circumstances obtain in the North Pacific. Thus, Bryant says of the young females:—

It is admitted that the larger number of the fur-seals of the eastern part of the North Pacific resort to the Pribyloff Islands to breed.

Elliott, Census Report, p. 41.

"Monograph of North American Pinnipeds," p. 387.

Bull. Mus. Comp. Zool., vol. ii, Part I, p. 105.

"Monograph of North American Pinnipeds," p. 386

United States' Case, Appendix, vol. i, pp. 376, 377.

"At this stage they [the female pups] leave the island for the winter, and very few appear to return to the island until they are three years old."

"Monograph of North American Pinnipeds," pp. 401, 402.

In the United States' Case many authorities are cited with the object of proving that the birth of the fur-seal at sea is impossible. The British Commissioners report practically in accordance with this view, or to the effect that

such birth, if possible, is so infrequent as to be of no practical importance; though the fact that the sea-otter brings forth its young on masses of floating kelp shows it to be not impossible that the fur-seal may at times also do so.

Formerly bred at other places along North-west coast, and probably still do so.

In regard to the birth of fur-seals at other places along the American coast besides the Pribyloff Islands, the British Commissioners, however, write as follows:—

British Commissioners' Report, para. 447.

"It is evident that many years ago a considerable number of fur-seals bred in various places along the western coast of North America. . . . . The traditions of the Indians of the coast of British Columbia, particularly those relating to Race Rocks and Smith's Island, appear to have the same meaning. Judge J. G. Swan has also collected much evidence to the same effect, with particular reference to the vicinity of Cape Flattery, which may be found detailed in the 'Fisheries Industries of the United States' (vol. ii, p. 393), and in the 'Bulletin of the United States Fish Commission' (vol. iii, p. 201). Some of his observations we have been unable to confirm, but the statements since obtained from Mr. J. W. Mackay go far to prove that, in still earlier years than those referred to by Judge Swan, a certain number of seals regularly occupied certain breeding-places in the vicinity of the Straits of Fuca."

Much evidence to the same effect is contained in the Report of the British Commissioners; and it may here also be noted, that many fur-seals were actually observed upon the Seal Rocks in Portland Canal, by the naval officers engaged in surveying there, in August 1868.

Vancouver Island, Pilot Supplement, 1883, p. 123.

Fur-seals resorting to Haystack Islands.

Mr. Mackay, above cited, states that it is probable that a few individuals still breed on the Haystack Islands, off Vancouver Island.

Appendix, vol. i, pp. 135, 136.

The Haystack Islands, together with other outlying islands to the north of Vancouver Island, were specially visited by Mr. Macoun in May 1892, and though the date was too early in the season to enable it to be determined whether fur-seals were actually breeding there, a considerable number of these animals was found frequenting the shores. The facts observed by Mr. Macoun will be found stated in his Report.

British Commissioners' Report, para. 449.

It is further pointed out by the British Commissioners that, even apart from the ascertained facts—

"it would be admissible to predicate the occasional birth of young along the whole extent of coast frequented by the fur-seal. It is further borne out by the actual existence of breeding rookeries situated along or near to the migra-

tion route of the fur-seal on the western side of the Pacific, on the Kurile Islands, and on Robben Island."

These facts (particularly when taken in connection with those relating to climate) show that, not only is it unsafe, but in all probability incorrect, to assert that *all* the seals frequenting the eastern part of the Pacific are born on the Pribyloff Islands; and this quite apart from the question of the commingling of seals of the two sides of the Pacific, which has previously been discussed.

Opinion of Judge Swan and Professor Allen.

In regard to this matter, Professor J. A. Allen, in his "Monograph" already cited, quotes Judge J. G. Swan, who has given much attention to subjects connected with the fur-seals. Judge Swan, after recording various observations made by him, writes:—

"Monograph of North American Pinnipeds," p. 772.

"It seems as preposterous, to my mind, to suppose that all the Fur-Seals of the North Pacific go to the Pribylov Islands, as to suppose that all the salmon go to the Columbia and Fraser's River or to the Yukon."

Commenting on Judge Swan's statements, and additional facts adduced by Professor D. S. Jordan, the well-known ichthyologist, Professor Allen himself writes:—

"These observations aside from the judicious suggestions made by Mr. Swan, are of special interest as confirming those made some years ago by Captain Bryant, and already briefly recorded (*ante*, p. *) in this work. They seem to show that at least a certain number of fur-seals repair to secluded places suited to their needs as far south as the latitude of Cape Flattery, to bring forth their young."

Ibid., p. 773.

Evidence appended to the United States' Case is sufficient to show that fur-seals are found in the vicinity of Cape Flattery, not only in the winter and spring, but also in smaller numbers during the greater part of the summer. Nearly all the Makah Indians of Cape Flattery state that seals are observed there till July. Further evidence to the same effect is contained in the Appendix to this Counter-Case, and is such as to show that fur-seals are found to the south of the Aleutian Islands during July, August, and September; while Indians state that they are to be seen off the coast of Vancouver Island all the summer.

United States' Case, Appendix, vol. ii. pp. 376–399.

Appendix, vol. ii, pp. 27–29.

* *Sic.*

British Commissioners' Report paras. 86–90.

Some facts showing the resort of fur-seals to new places and their attempts to form new rookeries are quoted in the Report of the British Commissioners. Further interesting particulars relating to the establishment of new rookeries have since been obtained. These refer to Mooshir, Rakokai, Shrednoi, and Ketoy Islands of the Kurile Group; Bittern Rocks off the north-west coast of Nipon Island and St. Iona Island, in the Sea of Okhotsk.

Appendix, vol. ii, pp. 34, 35.

Where begotten.

The particular locality in which the seals may be begotten, though importance seems to be attached to this in the Case of the United States, does not appear to be one of any special interest in connection with a claim to "property" in seals as such. The statements made on the part of the United States in this matter appear to be prompted by a disinclination to admit that any function necessary to the existence or propagation of the fur-seal species is or can be performed beyond the territorial limits of that Power. It may be sufficient here to say that the views now upheld by Bryant and Allen on this subject, and quoted in the United States' Case, are diametrically opposed to those formerly maintained by them; and that a sufficient body of independent evidence has been obtained to show that coition frequently occurs at sea. This circumstance is also quite in accord with what is known of the hair-seals.

United States' Case, p. 295.

Coition frequently performed at sea.

British Commissioners' Report, paras. 295–297. See also Proc. Zool. Soc., 1881, p. 380.

Conclusive evidence to this effect.

As this point has been raised in the discussion by the United States, it may be added that, in connection with other facts relating to seal life obtained from pelagic sealers, no less than 36 of these men affirm that they have witnessed the act at sea, and many not only describe the attendant circumstances, but have killed and secured both male and f[illegible].

Appendix, vol. ii, pp. 33, 34.

The known period of gestation and dates of birth are, in fact, alone sufficient to show that coition must frequently take place in the water far distant from the Pribyloffs.

Climate and formation of the Pribyloff Islands are not the chief reasons of resort of seals there.

Points connected with the physical characteristics of the breeding-grounds of the fur-seal, and its requirements in this respect, to which prominence is also given in the Case of the United States, have been so fully dealt with, from personal observation, by the British Com-

missioners, that it is considered unnecessary here to do more than refer to their Report, and to quote their conclusion, which is in the following words :—

British Commissioners' Report, paras. 244–276.

"As a further result of the examination of the physical characteristics of the rookery grounds, it may be stated that the necessary conditions, and even the most favourable conditions, are by no means confined to the Pribyloff and Commander Islands."

Ibid., para. 276.

Isolation and quiet the chief reason.

The British Commissioners likewise point out very clearly, that the isolation and the uninhabited character of the breeding resorts of the fur-seal, not only in the North Pacific, but generally over the world, are, (by reason of the security and absence from disturbance which they afford), the ruling factors in the selection of such resorts by it. Thus, except in the relative degree of importance attached to such isolation as compared with other circumstances, there is again a substantial agreement between the British Commissioners' Report and the statements made in the Case of the United States in this respect.

British Commissioners' Report, paras. 31, 247, 248.

Special prominence given to climate in United States' Case.

It will be observed, however, that particular importance is in the Case of the United States attached to the climate of the Pribyloff Islands, and that the requisite climatic features are stated to be found in the Pribyloff and Commander Islands only.

While it is well known that climatic conditions are among the most effective ruling causes of the limitation of range or habitat of all organic forms, whether animals or plants, the known facts are, it is believed, entirely opposed to the statement that other shores, and particularly other insular areas in the northern part of the North Pacific, are not equally well adapted in respect of climate for the residence of the fur-seal during the breeding season.

Wallace, "Geographical Distribution of Animals," vol. i, pp. 11, 12.

But this shown to be erroneous.

In view, however, of special prominence given to arguments based on alleged peculiarities of the climate of the Pribyloff Islands, in the Case of the United States, and Meteorological Tables quoted in support of these arguments, it may be well to show here :—

United States' Case, pp. 89–91.

Ibid., Appendix, vol. i, p. 591.

1. That the northern fur seal is tolerant of very considerable, or even of great, differences of climate in respect to its breeding-places.

2. That a large area of the northern part of the North Pacific, including many islands and long stretches of coast, affords climatic conditions

so similar at the breeding season of the seal, as to be for all practical purposes identical, from this point of view.

On this general subject the British Commissioners write:—

British Commissioners' Report, para. 247. See also paras. 276, 523.

"The cool and humid summer climate may doubtless in itself have been congenial to the seal, but in this respect, and also in the temperature of the sea surrounding them, well-marked differences occur as between the two groups [Commander and Pribyloff], while almost any of the numerous islands of the Aleutian chain afford surroundings so similar in the matter of climate that they would undoubtedly have afforded suitable breeding-places if similarly uninhabited."

Aleutian Islands afford similar conditions.

The United States' Commissioners also admit that "limited areas" on the Aleutian chain may afford the combination of physical and climatic conditions which they conceive to be necessary for the breeding of the fur-seal. It is believed, however, that these gentlemen speak thus cautiously in the absence of personal knowledge of the Aleutian Islands, whereas the whole length of the chain was inspected by the British Commissioners; and it may further be pointed out that, from the nature of the breeding habits of the seal, even limited areas such as those referred to, would be amply sufficient for the accommodation of very large breeding colonies.

United States' Case, p. 331.

Neither is the fur-seal strictly limited by condition of climate.

It must also be remembered that, even at the present time, breeding colonies are known to exist, not only on the Pribyloff and Commander Islands, but also on Robben Island, in the Okhotsk Sea, and on some of the Kurile Islands; and that, therefore, the actual summer temperature and climatic conditions of any of these places must be admitted to be congenial and favourable to the fur-seals at the breeding season.

The seals thus not wholly dependent on the Pribyloff Islands.

The importance of this fact lies chiefly in showing that, with proper protection from disturbance, new colonies may be formed; and that, in the event of the abandonment of one breeding-place by the seals, other and suitable ones may be found and occupied.

Appendix, vol. i, pp. 157 *et seq.*

A Memorandum and series of Tables relating to the climatic conditions of the places in question, have been furnished by Mr. C. Carpmael, Director of the Meteorological Service of Canada, and are printed in the Appendix. These show, in regard to temperature, that during the months May to October, including the period for which

the fur-seals resort to the various breeding-islands, the Pribyloff Islands are from 6 to 15 degrees cooler than Robben Island; while the Commander Islands, with the whole of the Aleutian Islands, are intermediate in this respect. The Kurile Islands generally closely resemble Robben Island in temperature.

It is also shown, from observations at Sitka and Port Simpson, that the mean temperature of the whole west coast of America south of the Aleutian Islands, as far as latitude 54° 30′, during the months of July, August, and September, lies between those of the Pribyloff and Robben Islands; while during May, June, and October, it ranges only from 4 to 8 degrees higher than that of Robben Island.

As to the number of cloudy or clear days, and the amount of precipitation and humidity, the available data are very incomplete; but still sufficient to show that the Commander, Pribyloff, and Aleutian Islands, with the west coast of America to the south of these islands, are all notably characterized by cloudy skies and frequent rain; though the actual amount of precipitation is much larger along the continental coast to the south of the Aleutian Islands.

Position taken by Professor Allen and cited in United States' Case not tenable.

In further support of the fact that the fur-seal is tolerant of very considerable diversity of climatic conditions, and in order to show that the point now insisted on by Professor J. A. Allen as to the necessary limitation of the breeding-places of the fur-seals of the eastern side of the North Pacific to the Pribyloff Islands is not well taken, the analogy in this respect of the closely-allied animal, Steller's sea-lion, may be noted. Respecting the fur-seal, this writer says, referring to breeding-places of this animal in California:—

"Such an assumption is entirely opposed to what is known of the habits and distribution of marine life, and to well-grounded principles of geographic distribution, namely, that a fur-seal breeding on an arctic island, which it annually travels thousands of miles to reach, would also choose for a breeding-station an island in sub-tropical latitudes."

United States' Case, Appendix, vol. i, p. 406.

He contradicts it by his own statements.

But on another page of the same Annex to the Case of the United States, he gives the habitat of Steller's sea-lion as—

"shores and islands of the North Pacific from Bering Strait southward to California and Japan."

Ibid., p. 372.

And writes further as follows :—

"Formerly (eighteenth century) abundant along the coast of Kamchatka from the Kurile Islands northward. There is still a small colony at the Farallon Islands, off the coast of California, and other considerable colonies at the Pribilof, Commander, and other small islands in Bering Sea. It is also found in greater or less numbers in some of the Aleutian Islands, and at a few points on the Alaskan coast, principally of the Aleutian chain."

Analogy of the sea-otter.

In the same way, the sea-otter, a fur-bearing animal which is in many respects comparable with the fur-seal, though its habitat has now become comparatively restricted in consequence of persistent hunting, was formerly abundant not only about the Pribyloff Islands, but also as far south as the 28th degree of latitude on the American coast.

Scammon, "Marine Mammalia," p. 168.

The theory of the restriction of the fur-seal to the Pribyloff Islands as its sole possible breeding-place is, therefore, not in any way supported by the appeal to the "principles of geographic distribution" here made. Professor Allen, indeed, explains that it has now been discovered that the fur-seal of the Californian coast is a different animal from that of the North Pacific; but this in no way affects the fact that many regions about the northern part of that ocean are naturally adapted by climate to become the breeding resorts of the North Pacific fur-seal proper.

United States' Case, Appendix, vol. i, p. 373.

Allen and Case not

his own

British Commissioners' Report, paras. 171–223.

After a full examination and discussion of the habits and migrations of the fur-seal, the British Commissioners thus sum up the result of their investigations :—

Breeding resorts and southern feeding resorts are equally necessary to the fur-seal of the North Pacific.

The seal is migratory and has two homes.

"The fur-seal of the North Pacific may thus be said, in each case [*i.e.*, in the case of the seals frequenting the two sides of the Pacific], to have two habitats or homes between which it migrates, both equally necessary to its existence under present circumstances, the one frequented in summer, the other during the winter. If it were possible to confine the fur-seal to the vicinity of the northern islands resorted to during the breeding season, or even within the limits of Behring Sea, the species would become extinct in a single year; but if, in any way, it were to be debarred from reaching the islands now chiefly resorted to for breeding purposes, it would, according to experience recorded elsewhere, speedily seek out other places upon which to give birth to its young."

Ibid., para. 28.

The precise meaning of these remarks is very clearly indicated by the map illustrating the resorts and migration-routes of the fur-seals, which is appended to the report cited. A less complete, and, as the evidence collected in the Report of the British Commissioners shows, less accurate migration chart of a part of the North Pacific, is appended to the United States' Case. But a reference even to this map will show the substantial accuracy of the statement made by the British Commissioners as to the resort, during nearly six months of the year, of the greater part of the seals of the eastern part of the North Pacific to the waters adjacent to the coasts of British Columbia.

British Commissioners' Report, Map No. II.

United States' Case, Map No. III.

Some importance appears, further, in the Case of the United States, to be attached to a statement which is made in the following terms :—

"The seals evidently consider these islands their sole home, and only leave them from being forced so to do. If the climate permitted they would without doubt remain on or in the vicinity of the Pribilof Islands during the entire year."

Ibid., p. 123. See also p. 295.

If climate permitted, the seals might never go very far from the breeding-islands.

Professor J. A. Allen writes to a similar effect, as follows :—

"It is evident from what we know of seal life elsewhere, that were the climate sufficiently mild in winter they would undoubtedly pass the whole year at these islands. Owing, however, to the inclemency of the winter months the fur-seals are forced to migrate southward in search of food and a milder climate."

Ibid., Appendix, vol. i, p. 405.

A like opinion as to the cause of migration is also recorded by the United States' Commissioners, and the British Commissioners express themselves in a similar manner.

United States' Case, p. 324.

British Commissioners' Report, paras. 28, 208.

The inquiries of the British Commissioners do not lead to the conclusion that the seals have ever in any considerable numbers remained on or about the islands even in the mildest winters. The table referred to in the United States' Case, Appendix II, gives no proof that more than a few stragglers have remained late in the year on the islands.

United States' Case, Appendix, vol. ii, p. 114.

As a problem in natural history, it might be of interest to discuss the originating causes of the migratory habit of the North Pacific fur-

seals, particularly as this habit is very exceptional among mammals, and stands in direct connection with the marine and pelagic nature of the fur-seal; but it is not relevant to the questions here at issue, for, as is stated in the Case of the United States:—

United States' Case, p. 124.

"The fact exists, however, that the Alaskan seal herd is compelled to migrate."

But climate does not permit, and the facts alone are here in point.

If the habits of the animal be appealed to, whether in connection with a claim to property right or to appropriate regulations for its preservation, it is the actual habits as these exist, and are imposed by the necessities of the case, that must be considered and dealt with.

The assertion that the Pribyloff Islands are the "only home" of the fur-seal is thus baseless.

The statement made in the Case of the United States to the effect that the Pribyloff Islands constitute the "only home" of the "Alaskan fur-seal," appears to be largely founded on similar statements made in the Report of the United States' Commissioners. But it is not admitted, even were it possible to show that all the fur-seals of the eastern part of the North Pacific resorted to the Pribyloff Islands for purposes of procreation, that these islands would in consequence be entitled to be characterized as their "only home." An attempt is made to justify the employment of the word "home" in this sense in the Report of the United States' Commissioners, as follows:—

Ibid., p. 324 (foot-note).

"The home of a species is the area over which it breeds. It is well known to naturalists that migratory animals, whether mammals, birds, fishes, or members of other groups, leave their homes for a part of the year because the climatic conditions or the food supply become unsuited to their needs; and that whenever the home of a species is so situated as to provide a suitable climate and food supply throughout the year such species do not migrate."

It is, however, important to note the recent opinion of one of the United States' Commissioners in an opposite sense, *i.e.*, to the effect that the winter resorts of animals breeding in the north may be equally entitled to be characterized as a "true home" of any species, the statement referred to being in precise accord with the employment of the word "home" in the Report of the British Commissioners. Dr. Merriam, in a critical note appended to a work by Professor W. W. Cooke, in fact, writes as follows:—

Dr. Merriam on summer, and winter homes of migratory animals.

'I cannot concur with Professor Cooke in the belief that 'love of the nesting-ground . . . . is the foundation of the desire for migration.' In a lecture on bird migration which it was my privilege to deliver in the United States' National Museum on the 3rd April, 1886, I said: 'Some ornithologists of note have laid special stress upon the "strong home affection" which prompts birds to leave the south and return to their breeding-grounds. To me this explanation is forced and unnecessary. Birds desert their winter homes because the food supply fails; because the climatic conditions become unsuited to their need; because the approach of the breeding season gives rise to physiological restlessness; and because they inherit an irresistible impulse to move at this particular time of the year."—C. H. M.

"Report on Bird Migration in the Mississipi Valley," by W. W. Cooke, 1888. United States' Department of Agriculture, Div. of Econ. Ornithol., Bull. No. 2, p. 11 (foot-note).

Enormous quantity of food fishes consumed by seals when in their winter home.

In concluding the discussion of the group of questions dealt with in this Chapter, it is desirable to draw attention to the fact that the winter home or habitat of the fur-seal, being, as it is, chiefly in the vicinity of the coast of British Columbia, affords to the residents of that coast an excellent ground of claim to participate in the profits derived from the hunting of the fur-seal, in so far at least as any such claim can be based on the habits and haunts of the animal. This depends not so much on the mere proximity of the seals to this coast at the season mentioned, as on the enormous quantity of food fishes which the seals consume there, which, if not thus taken, would be available for the direct support of the inhabitants. The inroads of the seals upon the fisheries are, in fact, of a most serious kind; and any claim which necessitates the abstention from sealing of the people so affected in the sole interests of a Corporation or Government which profits by the killing of the seals upon their distant breeding-islands, must be considered as essentially unjust.

Amount of fish consumed.

Resulting damage to fisheries.

The injury done to fisheries by seals of all kinds, even when in comparatively small numbers, is well known. What, then, must be the effect of vast bodies of fur-seals known to congregate on the coast of British Columbia, from which, without counting the pelagic catch proper, about 3,000 skins are taken each year by the Indians venturing to sea in their dug-out canoes, and, therefore, at no great distance from land?

British Commissioners' Report, para. 569.

Without endeavouring to cite numerous authorities on the damage done to the food fishes by seals, the following may be quoted as examples of this well-understood fact:—

Baltic.

Appendix, vol. i, p. 177.

The fisheries of Sleswick-Holstein, on the Baltic, in 1887, were so damaged by seals that it was feared they might be absolutely ruined, and measures had to be taken to destroy the seals.

Iceland.

Ibid.

In Iceland so much damage has been done to the salmon fisheries that special statutory provisions have been introduced, enabling persons "to shoot or frighten" seals coming near the fisheries.

Denmark.

Ibid.

In Denmark, in order to save the fishing industry, rewards have been offered for each seal killed.

Massachusetts.

Ibid.

The bay fishing in Essex, Massachusetts, in 1892, was so seriously injured by seals that the authorities offered a reward of 1 dollar for each seal killed.

United States' Case, Appendix, vol. i, p. 421.

Dr. Alfred Nehring, Professor of Zoology in the Royal Agricultural College of Berlin, likewise in a letter addressed to Dr. Merriam, and in reply to his "Circular letter" (elsewhere referred to) speaks with approval of the pursuit of the fur-seal where, in its winter quarters, it is destructive to the fisheries.

Actual quantity of fish consumed.

With special reference to the destruction of food fishes caused by the fur-seal of the North Pacific, Mr. H. W. Elliott states his belief that a full-grown male seal consumes per diem about 40 lbs. of fish, adult females at least 10 lbs. or 12 lbs., and the rapidly growing pups or young bachelors not much, if any, less. He adds:—

United States' Census Report, p. 64.

"Therefore, this great body of 4,000,000 or 5,000,000 hearty active animals which we know on the seal islands, must consume an enormous amount of such food every year. They cannot average less than 10 lbs. of fish each per diem, which gives the consumption, as exhibited by their appetite, of *over* 6,000,000 *tons of fish every year.*

* * * *

Elliott's estimate 6,000,000 tons per annum.

Ibid. (foot-note).

"If the seals can get double the quantity which I credit them with above, startling as it seems, still I firmly believe that they eat it every year. An adequate realization by ichthyologists and fishermen as to what havoc the fur-seal hosts are annually making among the cod, herring, and salmon of the north-west coast and Alaska would disconcert and astonish them."

Neither are the depredations of the fur-seal on the British Columbian coast entirely confined to

such fishes as at certain seasons frequent the open sea, for though it is stated in the Case of the United States that the seals—

"do not enter the inland waters of the coast during their migration, remaining always in the open sea or at the mouths of large bays, inlets, and gulfs"—

United States' Case, p. 127.

this statement shows only an imperfect acquaintance with the facts. The notes obtained by the British Commissioners on the coast of British Columbia prove, in fact, that the fur-seals frequent Dixon Entrance, Hecate Strait, Observatory Inlet, Queen Charlotte's Sound (sometimes even going to the head of Knight's Inlet), the Strait of Fuca, and in former years resorted even to the Gulf of Georgia. Mr. J. W. Mackay further writes as follows: –

Fur-seals even enter inland waters of British Columbia, and prey upon fish there.

British Commissioners' Report, paras. 177–179.

Ibid., para. 185.

"During the spring, numbers of the young animals fish in the broken waters inside the half-tide rocks and reefs which fringe the western shores of Vancouver Island and of the other islands which lie west of the mainland from Queen Charlotte Sound to Dixon Entrance."

Ibid., para. 183.

And Captain John Devereux, formerly Commander of the Canadian Government steamer "Douglas," says:—

"When they are found along the bank on the west coast of Vancouver Island they are feeding on their natural feeding-grounds."

Ibid., para. 184.

Adding that—

"Though often far off the land, he has frequently found them inshore, and even 18 miles up Barclay Sound; as well as in the Strait of Fuca, and, on rare occasions, in the Gulf of Georgia."

Conclusions

It is contended on behalf of Her Majesty's Government that, in view of the facts set forth in the present Chapter, there is no just ground for regarding the Pribyloff Islands as the sole home or habitat of the fur-seals which generally resort there for breeding purposes. That, having regard to the large proportion of the year during which they frequent other coasts and other waters, and the fact that the whole of their food is obtained from the open sea, no claim to treat them as property, or as a "natural product of the soil," can be supported, on the ground that for a limited portion of the year they frequent the shores and territorial waters of the Pribyloff Islands for breeding purposes.

CHAPTER VIII.

Recapitulation of Argument.

It is submitted that, with reference to the five points stated in Article VI of the Treaty of Arbitration, and the facts bearing thereon, the arguments and considerations in the foregoing Chapters have established :—

Chapter I.—As regards the user of the waters of Behring Sea and other waters of the North Pacific up to the year 1821—

1. That the propositions that were formulated on p. 36 of the British Case with reference to the user of the waters of Behring Sea up to the year 1821, and supported by the evidence cited therein, have not been displaced by any facts or arguments produced in the Case of the United States; but, on the contrary, that the further examination of the subject establishes that, down to the year 1821, Russia neither asserted nor exercised in the non-territorial waters of the North Pacific, including the body of water now known as Behring Sea, any rights to the exclusion of other nations.

Chapter II.—As regards the Ukase of 1821, and the circumstances connected therewith, leading up to the Treaties of 1824 and 1825—

2. That the conclusions claimed to have been established in the British Case, as stated at p. 58, are fully supported, and that the further evidence which has been adduced, clearly shows that the Ukase of 1821—the first and only attempt on the part of Russia to assert dominion over, and restrict the rights of other nations in, the non-territorial waters of the North Pacific, including those of Behring Sea—was made the subject of immediate and emphatic protest by Great Britain and by the United States. That thereupon Russia unequivocally withdrew her claims to such exclusive dominion and control.

CHAPTER III.—As regards the question whether the body of water now known as Behring Sea is included in the phrase "Pacific Ocean," as used in the Treaty of 1825 between Great Britain and Russia—

3.—(*a.*) That the Conventions of 1824 and 1825 declared and recognized the rights of the subjects of Great Britain and the United States to navigate and fish in all parts of the non-territorial waters over which the Ukase purported to extend.

(*b.*) That the body of water now known as the Behring Sea was included in the phrase "Pacific Ocean," as used in the Treaty of 1825 between Great Britain and Russia; and

(*c.*) That the constructions placed on the term "North-west coast" or "North-west coast of America" in the case of the United States are unsound.

CHAPTER IV.—As regards the user of the waters in question from 1821 to 1867—

4. That the conclusions claimed to have been established in the British Case, as stated at p. 90, are fully supported; and that the further evidence which has been adduced clearly shows that, with the growth of commerce and increase of trade subsequently to the year 1821, vessels of nations other than Russia, without let or hindrance, frequented, traded, and fished in the waters of Behring Sea; and that no attempt was ever made during the whole period to restrict the use of those waters to vessels carrying the Russian flag.

CHAPTER V.—As regards the question what rights passed to the United States under the Treaty of Cession of the 30th March, 1867—

5. That the contentions of the United States are based upon two assumptions, both of which are entirely erroneous.

The first, that prior to the year 1867 Russia had, in fact, excluded the vessels of other nations from Behring Sea.

The second, that the language of the Treaty of 1867 describes, and purports to convey, some special rights in the non-territorial waters of Behring Sea.

As to the first, the considerations contained in the first four Chapters have established that, prior to 1867, Russia had not, at any time, excluded from Behring Sea the vessels of foreign nations.

As to the second, a reference to the language of the Treaty—which is set out at pp. 91 to 94 of the British Case—shows that Russia was conveying territories which were then admitted to form part of the Russian Empire, but with no more than the ordinary territorial rights.

CHAPTER VI.—As to the question whether the United States has any, and, if so, what right of protection or property in the fur-seals frequenting the islands of Behring Sea when such seals are found outside the ordinary 3-mile limit—

(*a.*) That the authorities cited, and arguments brought forward, support the proposition that the sole right of the United States in respect of the protection of seals is that incident to territorial possession, including the right to prevent the subjects of other nations from fishing in territorial waters.

(*b.*) That the United States have not, nor has any citizen of the United States, any property in fur-seals until they have been reduced into possession; and that the property so acquired endures so long only as they are retained in control.

(*c.*) That an examination of the Colonial and foreign laws referred to in the United States' Case shows that international usage in no way establishes, and in no instance sanctions, the principle asserted by the United States, but, on the contrary, confirms the following propositions at p. 160 of the British Case:—

The right of the subjects of all nations to navigate and fish in the non-territorial waters of the sea now known as Behring Sea, remains and exists free and unfettered; and cannot be limited or interfered with, except with the concurrence of any nations affected.

No regulations affecting British subjects can be established for the protection and preservation of the fur-seal in the non-territorial waters of Behring Sea without the concurrence of Great Britain."

CHAPTER VII.—As regards the allegations of fact put forward by the United States in connection with Point 5 of Article VI, it is submitted—

SECTION 1.—That no grounds exist to justify the application to the fur-seal of the designation

of land animal, when admittedly it derives its entire sustenance from the ocean, and passes there two-thirds, if not more, of its existence.

SECTION II.—That there is no just ground for the contention that the seal is domestic in its habits.

SECTION III.—That the assertion that the fur-seals resorting to the Commander and Pribyloff Islands form two entirely and rigidly separated "herds" has been shown to be erroneous.

That, on the contrary, the facts ascertained from a large body of testimony establish that the fur-seals which breed upon the islands on both sides of Behring Sea intermingle.

SECTION IV.—That there is no just ground for regarding the Pribyloff Islands as the sole home or habitat of the fur-seals which generally resort there for breeding purposes. That, having regard to the large proportion of the year during which they frequent other coasts and other waters, and the fact that the whole of their food is obtained from the open sea, no claim to treat them as property or as a "natural product of the soil" can be supported on the ground that for a limited portion of the year they frequent the shores and territorial waters of the Pribyloff Islands for breeding purposes.

CONCLUSION.

The above propositions, which are supplemental to those stated in Chapter X of the British Case, demonstrate, in the submission of Her Majesty's Government, that the five points stated in Article VI of the Treaty of Arbitration must be decided in favour of the contention of Great Britain, and that the United States have wholly failed to establish any exclusive right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when found outside the ordinary 3-mile limit; that the subjects of Great Britain have, in common with those of all other Powers, the right to navigate on and fish in, the non-territorial waters of Behring Sea; and that any restrictions upon [illegible] exercise of the [illegible] with the [illegible] of Great Britain.

PART II.

CHAPTER IX.

General Considerations affecting the Question of Regulations.

IT is necessary in approaching the consideration of the question of Regulations (if any are to be made) to recall its relation to the five points raised by the VIth Article of the Treaty, bearing in mind that it is only in the event of those five questions having been so determined as to render the concurrence of Great Britain necessary that the authority of the Arbitrators as to Regulations arises (Article VII).

What, then, does that determination involve? It involves the recognition of the proposition that Behring Sea is to be regarded as a sea open to the commerce and to the fishermen of the world, and that the United States have no exclusive right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary 3-mile limit.

It follows that the rights and interests of the United States in fur-seals frequenting such islands do not differ from the rights and interests of any other portion of mankind, except in so far as the territorial possession of those islands by the United States gives to their nationals the exclusive right of capture in territorial waters, and the advantages derived from the fact that the seals congregate in large numbers on those islands, thereby giving the opportunity for their slaughter.

In the next place, it is to be remembered that the object of Regulations (assuming any Regulations to be made) should be the preservation of the fur-seal industry for the benefit not of the United States alone, but of all those who may

find it profitable to pursue this industry in non-territorial waters.

No such Regulations can be just or effective unless accompanied by corresponding and correlative control over the islands and over the time, method, and extent of slaughter upon them by the nationals of the United States of America.

To enforce Regulations which would shut out British subjects at certain seasons, and from prescribed areas, from the pursuit of pelagic sealing, and at the same time would leave the slaughter of seals on the islands to be pursued according to the mere will of the lessees of those islands or of their Government, would be to establish Regulations one-sided in their character, and, therefore, unjust and also ineffective for the object in view, namely, the preservation of seal life.

It will be shown later, that the action of the lessees upon the islands, both as to times, methods, and extent of slaughter, has heretofore exercised a more serious effect in causing the diminution of seals in Behring Sea than the pelagic sealing.

It is submitted, therefore, that no Regulations applying to pelagic sealing only ought to be formulated unless and until the United States of America have established proper and effective Regulations applicable to the islands.

Otherwise, the result would be that the Regulations would restrict pelagic sealing by British subjects, for the benefit of the United States, whilst leaving the action of their nationals in territorial waters and on the islands without control.

But it further follows that any Regulations, to be at once just and effective, must bind all who have the right to resort to Behring Sea in pursuit of fur-seals.

According to the express terms of the VIIIth Article of the Treaty, the authority of the Arbitrators as to concurrent Regulations is confined to Regulations outside the jurisdictional limits of the respective Governments of Great Britain and the United States of America.

It is clear, therefore, that Regulations would require domestic legislation by Great Britain and the United States respectively, in order to binding even on their respective nationals, but that domestic legislation by Great Britain could not bind the nationals of the United States of

America, neither could legislation by the United States of America bind the nationals of Great Britain.

Equally obvious is it that the legislation of neither country could bind the subjects of any other country.

It would therefore be open to the nationals of Chile, Germany, Holland, Japan, Russia, or of any other Power, to disregard any Regulations made; and if their convenience and interest pointed in that direction, to pursue the fur-seal fishing industry at times when, and in a manner and under circumstances in which, the like pursuit would be forbidden to the nationals of Great Britain and of the United States of America respectively.

It may be anticipated also that owners of both United States' and Canadian sealing-vessels would sail their vessels under the flag of some other nation, so as to obtain immunity from such Regulations.

These results, it will be admitted, have not been contemplated by either of the two great Powers parties to the Treaty, nor would they be conducive to their respective interests.

That the adhesion of other Powers has been regarded by Great Britain and the United States of America respectively as important, is shown by the concluding words of the Fifth Article of the Convention, in which "the High Contracting Parties shall use their best efforts to cooperate in securing the adhesion of other Powers to such Regulations."

No doubt the Powers have [illegible] expressed their willingness to be party to [illegible] such as the Arbitrators [illegible] to be right and proper; and it appears that to invite and [illegible] Powers [illegible] the jurisdictional [illegible] Britain and the United States of America would be one. Binding up their respective nationals and upon them only, would tend to prevent rather than to promote the adhesion of other Powers in the future.

It is submitted that, if any Regulations not prescribed, they ought to be so framed as only to come into operation through the instrumentality of a Convention at which all the Powers interested shall be represented, and at which proper provisions for their enforcement binding on the nationals of all such Powers shall be formulated.

or that they should be conditional upon the adhesion of such other Powers.

It is further submitted that, in view of the great international interests involved, it is fitting that the United States of America should express their willingness to frame proper and just concurrent Regulations applicable to the islands and their territorial waters.

The position here taken on the part of Great Britain is that already taken in the original Case. It is there stated:— British Case, p. 9.

"Finally, that while Great Britain has from the first strenuously and consistently opposed all the foregoing exceptional pretensions and claims, she has throughout been favourably disposed to the adoption of *general* measures of control of the fur-seal fishery, should these be found to be necessary or desirable with a view to the protection of the fur-seals, provided that such measures be equitable and framed on just grounds of common interest, and *that the adhesion of other Powers* be secured as a guarantee of their continued and impartial execution."

For the correspondence on this point, the Arbitrators are respectfully referred to the Appendix to the United States' Case. United States' Case, Appendix, vol. i, pp. 339-345.

A claim is made in the concluding words of the United States' Case that such Regulations be— United States' Case, p. 303.

"prescribed by this high Tribunal, as will effectually prohibit and prevent the 'capture anywhere upon the high seas of any seals belonging to the said herd.'"

Her Majesty's Government respectfully protest that no power to impose on the Contracting Parties a total prohibition of pelagic sealing is conferred on the Tribunal by the Arbitration Treaty, whether the assent of other nations be or be not made a condition of such prohibition.

Article VII empowers the Arbitrators to—

"determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend."

The power thus conferred relates to the only area in dispute, viz., the waters of Behring Sea eastward of the line of demarcation specified in the Treaty of Cession of 1867, and excludes the supposition that prohibition could have been intended.

The object of Regulations, as laid down in Article VII, is "the proper protection and preservation of the fur-seal;" not its reservation for the United States' Government and their lessees.

The correspondence which resulted in the Arbitration Treaty shows that the construction of that Treaty now relied on by Great Britain accords with the intentions of both Powers at the time its provisions were framed. Mr. Blaine, in his despatch of the 17th December, 1890, says:—

United States' Case, Appendix, vol. i, p. 284.

"The President will ask the Government of Great Britain to agree to the distance of 20 marine leagues—within which no ship shall hover around the Islands of St. Paul and St. George, from the 15th May to the 15th October of each year. This will prove an effective mode of preserving the seal fisheries *for the use of the civilized world*.— . . The United States desires only such control over a limited extent of the waters in the Behring Sea, for a part of each year, as will be sufficient to insure the protection of the fur-seal fisheries."

The writer, after proposing the five questions, which, with modifications in the third and fifth, are now embodied in Article VI, proceeds:—

Ibid., p. 286.

"Sixth. If the determination of the foregoing questions shall leave the subject in such position that the concurrence of Great Britain is necessary in prescribing Regulations for the killing of the fur-seal in any part of the waters of Behring Sea, then it shall be further determined:—

"First, how far, if at all, outside the ordinary territorial limits it is necessary that the United States should exercise an exclusive jurisdiction in order to protect the seal for the time living upon the islands of the United States, and feeding therefrom.

"Second, whether a closed season (during which the killing of seals in the waters of Behring Sea outside the ordinary territorial limits shall be prohibited) is necessary to save the seal-fishing industry, so valuable and important to mankind, from deterioration or destruction. And, if so,

"Third, what months or parts of months should be included in such season, and over what waters it should extend."

The Marquis of Salisbury in a letter to Sir J. Pauncefote, dated the 21st February, 1891, which contains his answer to Mr. Blaine, says:—

Ibid., p. 294.

"H. . Majesty's Government have no objection to refer [illegible] question of a close time to arbitration, or to [illegible] that means how far the enactment of such [illegible] provision is necessary for the preservation of the [illegible] but such reference ought not to contain words

appearing to attribute special and abnormal rights in the matter to the United States."

In a letter from Mr. Wharton to Sir J. Pauncefote, dated the 25th June, 1891, this passage is quoted, and the writer adds:—

"I am now directed by the President to submit the following, which he thinks avoids the objection urged by Lord Salisbury."

United States' Case, Appendix, vol. i, p. 319.

Then follows the clause which now forms Article VII of the Treaty.

Lastly, it is to be remembered that, if protection is to be given to which the United States has now no legal right, and if such protection involves injury to the existing legal rights of Great Britain, the question must arise, as to the terms and conditions upon which such protection should be afforded.

Subject to the foregoing observations, the scheme and scope of any Regulations outside the jurisdictional limits of the respective Governments might, it is submitted, embrace the following subjects, or some of them:—

The maintenance of a zone of protected waters round the breeding islands.

British Commissioners' Report, § 155 (*b*).

The provision of a close season.

Ibid., § 155 (*c*).

Provision that no sealing-vessel shall enter Behring Sea in each year before a given date.

Prohibition of the use of rifles in shooting seals at sea.

Prohibition of nets as a means of capture at sea.

Provision that all sealing-vessels shall be licensed, and shall carry a distinctive flag.

On the other hand, in order that Regulations of this nature, or any other Regulations, may be effective for the proper preservation of seal life, it is necessary, in the opinion of Her Majesty's Government, that Regulations should be enforced by the United States on the breeding-islands dealing with the following subjects:—

Limitation of the number of seals to be killed in each year, such limit to be subject to periodical review by independent Government Agents, having regard to the actual condition of the breeding-islands.

Effective provisions to prevent raiding and disturbance upon the islands.

And such subsidiary provisions as may be considered necessary for the effective carrying out of these suggestions.

United States' Case, pp. 253–264.

In the United States' Case, four proposals for "a limited prohibition" are separately discussed, and each in turn is discarded as useless. By the term "limited prohibition," it is probably intended to designate the "concurrent Regulations" mentioned in the Treaty of Arbitration, but, as has already been shown, prohibition is not regulation.

The main argument of the United States is based on the assumption (shown to be erroneous) that the decrease of seals on or in the neighbourhood of the Pribyloff Islands is attributable entirely to pelagic sealing, and on the further assumption that Regulations should be framed in the sole interest of the owners of the Pribyloff Islands.

British Commissioners' Report, para. 132.

It is shown in the Report of the British Commissioners that no single measure or precaution is in itself equally appropriate to the several modes of taking seals, or separately capable of affording adequate safeguards in the interests of seal life. But it is further shown that, by a judicious combination of checks of various kinds, an efficient system of control may readily be established, so as to embrace the whole industry based upon the taking of fur-seals, and readily adaptable in its nature to varying circumstances. The method adopted in the Case of the United States of discussing and condemning separately certain measures applicable to sealing at sea is insufficient and inconclusive. No doubt total prohibition of pelagic sealing would be favourable to the owners of the Pribyloff Islands as leaving them unaffected, while disposing of the competition of their rivals (the sealers) on the high seas; but such prohibition would be manifestly unjust to the other interests concerned.

Ibid., para. 137.

It is therefore scarcely necessary at this stage to follow in any detail the arguments advanced in the United States' Case against the several modes of regulation there selected for discussion, or to indicate how erroneous are the grounds on which the suggested regulations are there condemned.

For instance, a close season as applied to sealing at sea is supposed to be sufficiently condemned by pointing out that differences of opinion exist amongst the witnesses as to the time of year which it should cover.

Again, Professor Huxley's opinion is referred to as in favour of total prohibition of pelagic sealing; but on reference to his statement, it will be seen that he is careful to point out that,

United States' Case, Appendix, vol. ii., p. 452.

under the circumstances of the case, total prohibition is impossible, and, to use his own language, is "out of the question."

The proposition that a protective zone should be established round the Pribyloff Islands is treated as an absurdity, although, writing as late as the 17th December, 1890, Mr. Blaine himself made this proposal in words already quoted.

See *ante*, p. 163.

In the Case of the United States, frequent allusions are made to the opinions expressed in letters by certain well-known naturalists as to the best mode of preserving and protecting the fur-seal. The method in which these opinions were obtained, and the data upon which they were based, require some notice.

In Article IX of the Treaty of Arbitration it is provided that—

"Each Government shall appoint two Commissioners to investigate jointly with the Commissioners of the other Government all the facts having relation to seal life in Behring Sea, and the measures necessary for its proper protection and preservation.

"The four Commissioners shall, so far as they may be able to agree, make a Joint Report to each of the two Governments, and they shall also report, either jointly or severally, to each Government upon any points upon which they may be unable to agree.

"The Reports shall not be made public until they shall be submitted to the Arbitrators, or it shall appear that the contingency of their being used by the Arbitrators cannot arise."

In view of the above provisions, and particularly of the last-mentioned one, which enjoins the privacy of the Reports, the British Commissioners have preserved the strictest reticence with regard not only to the Joint Report, but also in the matter of their Several Report, and have not disclosed in any way the conclusions at which they have arrived on the various points.

However, Dr. C. Hart Merriam, one of the United States' Commissioners, has submitted to certain naturalists a "Circular letter" bearing on the subject-matter prepared for the consideration of this Tribunal.

In the introductory paragraph of his "Circular letter" Dr. Merriam writes as follows, dating from Washington, April 2nd, 1892:—

"Dear Sir,

"The Government of the United States have selected me as a naturalist to investigate and report upon

the condition of the fur-seal rookeries on the Pribilof Islands in Behring Sea, with special reference to the causes of decrease and the measures necessary for the restoration and permanent preservation of the seal herd. I visited the Pribilof Islands and made an extended investigation of the subject, the results of which are briefly outlined.

And in the concluding paragraph writes:—

United States' Case. Appendix, vol. i, p. 414.

"Having been [illegible] by my Government [illegible] a memorial, and having investigated the [illegible] the above conclusions and [illegible] the [illegible] of [illegible] [illegible] numerous [illegible] necessary [illegible] case [illegible] usually obliging [illegible] which [illegible]."

Ibid., p. 417

No mention is made of the Agreement entered into by the Governments of Great Britain and the United States in respect to the joint character of the investigation of the facts of seal life; and, in the absence of other sources of information, the naturalists to whom these explanations were addressed would, it is submitted, naturally assume as correct the facts stated by Dr. Merriam.

To the mere fact of the submission of the questions at issue respecting the fur-seal, and the methods appropriate for its preservation, to the judgment of well-informed naturalists, no exception can be taken. But on examining the body of the "Circular letter," it is found to be a précis of the more important conclusions contained in the Several Report of the United States' Commissioners. It thus consists of a series of assertions and arguments, some of which are in direct opposition to the conclusions and opinions formed by the British Members of the Joint Commission, and many of which involve assumptions of fact which are directly controverted.

Dr. Merriam was, at the time of writing and dispatching this Circular letter, well aware of the different views held on many points by the British Commissioners. The date of the letter is nearly one month later than that of the conclusion of the joint Conferences of the Commissioners.

It is unnecessary here to discuss the statements made in the Circular letter itself, as they are considered in detail in other parts of this Counter-Case. Neither would it serve any good purpose to criticize at length the nature of the replies published.

It is, however, to be noted that several of the naturalists, whose replies are given, do not wholly agree with the conclusions placed before them.

Thus, Dr. Alphonse Milne Edwards, does not commit himself to Dr. Merriam's conclusions respecting the required mode of protection of the seals. He parallels the conditions, very appropriately, with those affecting migratory birds. In conclusion, he states that only an International Commission can lay down Rules for the protection of the fishery.

Dr. Alfred Nehring, points out that the pursuit of the fur-seal in its southern winter quarters may be justified on the ground of its destructiveness to fish.

Professor Robert Collet, believes the matter to be one for an International Agreement for a close time, similar to that in force respecting the seal fisheries of the North Atlantic.

Dr. Gustav Hartlaub, writing apparently with no other knowledge of the matter than that afforded by Dr. Merriam's letter, briefly states his agreement with its general conclusions, but regrets that for practical reasons the prohibition of hunting for a few years cannot be thought of.

Professor Count Tommaso Salvadori, points out that, in addition to the effects attributed to pelagic sealing, he believes the killing upon the islands to have been too great.

Dr. Leopold von Schrenck, in brief terms, records his full agreement with the statements presented to him.

Dr. Henry H. Giglioli, likewise fully agrees with Dr. Merriam, but takes occasion to dep loe the killing of "pups" on the islands, which, it will be remembered, was allowed to continue till 1891.

Dr. Raphael Blanchard, points out that the killing of young males on land requires to be regulated and severely limited, as well as the killing at sea. He believes the matter to be one for an International Commission.

Professer Wilhelm Lilljebord and Baron A. E. Nordenskiöld, point out that the protection required clearly divides itself into that on land and that of seals at sea, where near to or connected with the breeding rookeries.

Dr. A. von Middendorf, states that international protection is necessary.

Dr. Emil Holub, likewise believes that pro-

tection must be accorded equally at sea and on the breeding-islands. He suggests an International Congress.

Dr. Carlos Berg, in a few lines, agrees entirely with Dr. Merriam's conclusions.

The statements made by two other naturalists, to whom it does not appear that Dr. Merriam's "Circular letter" was sent, must, in conclusion, be mentioned. These are Professor T. H. Huxley and Dr. P. L. Sclater.

Professor Huxley's opinion as given in the Appendix of the United States' Case constitutes a fair statement of conclusions and recommendations, such as may well have been based on the published evidence available up to the time at which it was written, but which, of course, did not include the Report of the investigations of the British Behring Sea Commissioners or other later evidence.

Professor Huxley admits the manifest rights of British and all other sealers at sea, and of the United States, on the Pribyloff Islands. He points out that it is the interest of both parties to preserve the seals, but that even the concurrence of both Governments would be insufficient, as this would not exclude sealers under other flags. He suggests that a Joint Fishery Commission might be established to deal with, and make laws for, the Pribyloff, Behring, and North-west Coast fisheries, under the terms of a General Treaty, to which other Powers would probably agree.

The whole tenour of the statement is eminently practical, endeavouring to deal with the facts of the case as they exist and must be met, and is in this respect in singular contrast with the schemes of protection and control which are prominently advocated in other parts of the United States' Case.

United States' Case, Appendix, vol. i, p. 411.

Dr. Sclater's affidavit consists of three short clauses embracing many theoretical assertions, and making no effort whatever to deal with the actual circumstances, or to provide a means of control of shore and sea sealing, both of which, he admits, must be regulated. The third clause, in fact, shows that the author was not aware of the actual character of the management of the breeding-islands and mode of killing there, as explained in another part of this Counter-Case. In this respect, it is in accordance with the similar theoretical assertions elsewhere found in

the Case of the United States, and cannot be admitted to have more weight than these.

Upon any discussion before the Tribunal upon the subject of the Regulations, Her Majesty's Government will refer, if necessary, to a supplementary Report of the British Commissioners, which is now in course of preparation, and will, it is believed, be presented on Her Majesty's Government by the 31st January 1893.

The succeeding chapters have been prepared in order that the Arbitrators may be put in possession of the main facts material to the consideration of the question of Regulations, and of the reply on behalf of Her Majesty's Government to the arguments and allegations of fact contained in the Case of the United States with reference to pelagic sealing and the management of the islands in the past.

CONSIDERATION OF STATEMENTS PUT FORWARD BY THE UNITED STATES BEARING UPON THE QUESTION OF THE NECESSITY FOR REGULATIONS.

CHAPTER X.

Date and Amount of the observed Decrease in the Number of Seals.

THE UNITED STATES CASE.

(1.) Under [illegible]—

"Under this careful management of the United States Government the seal herd on the Pribilof Islands [illegible]"

(2.) Under [illegible]—

"From the year 1880 [illegible]

[illegible]

(1.) Under [illegible]

"[illegible]

[illegible]

No trustworthy numerical data exist to prove the amount of decrease on the Pribyloff Islands, and the evidence relied on by the United States to prove its great proportions is incorrect or inconclusive.

There has been no decrease of seals at sea corresponding with that said on the Pribyloff Islands, the number at sea having proportionately, if not actually, increased in late years; an effect probably due to the disturbance incident to killing on the islands.

The United States contentions summarized and explained.

From the quotations given above, it appears to be affirmed in the Case of the United States that the seals increased in number on the Pribyloff Islands under the control of the United States' Government at least up to the year 1884; that from the year 1880 to the year 1884-85 the number remained stationary, but that in 1885 a decrease began,* which in subsequent years continued and became greater; that such decrease was observed not alone on the Pribyloff Islands, but also at sea generally; that it commenced contemporaneously with the increase of pelagic sealing, and is of an exceedingly grave and alarming character.

United States' Case, p. 104.

Ibid., pp. 105 [illegible]

Ibid., p. 206.

The [illegible] has no [illegible] proof [illegible] the [illegible] of the [illegible] increase [illegible] the [illegible] of the United [illegible] These special [illegible].

The [illegible] of pelagic [illegible] [illegible] pelagic [illegible] [illegible] to [illegible] The [illegible].

[illegible] United States [illegible]

[illegible]

Ibid., p. [illegible].

[illegible]

In [illegible] to arrive [illegible] of this examination, it is necessary [illegible] first

* The data do not [illegible] [illegible] the [illegible] [illegible].

place to ascertain correctly the date at which the diminution commenced, and the amount of the diminution.

Upon this point the conclusion arrived at by the British Commissioners is expressed in their Report in the following terms:—

British Commissioners believe decrease to have been practically continuous under United States control.

British Commissioners' Report, p. 57.

"A [illegible] in the number of seals [illegible] [illegible]"

[illegible]

With reference to [illegible] in the Case of the United States [illegible] [illegible] islands with that [illegible] [illegible] earlier years [illegible] seals had become [illegible] in taking their [illegible] [illegible] reached—

[illegible]

[illegible]

[illegible]

The opinion above expressed [illegible] confirmed [illegible] [illegible] investigation [illegible] Mr. [illegible] pursuance of [illegible] islands in 1890, [illegible] rookeries, his [illegible] specially qualified [illegible] inquiry.*

* [illegible] Report [illegible] United States Government [illegible] Appendix vol. [illegible] [illegible]

In treating of the causes and time of commencement of the decrease, Mr. Elliott alludes both to excessive killing on the islands and to pelagic sealing, and of the former he writes as follows :—

"Why is it that we find now only a scant tenth of the numbers of young male seals which I saw there in 1872? When did this work of decrease and destruction, so marked on the breeding grounds, [illegible] This answer follows:

British Case, Appendix, vol. iii, "United States No. 2 (1891)," p. 56.

"(1) From [illegible] 1879, [illegible]

Elliott traces this difficulty back to 1879.

And further on as follows:—

"[illegible]

Ibid., p. 57.

[illegible] the British Commissioners also [illegible] 1872 [illegible] "[illegible]" [illegible] Other [illegible] Dr. [illegible] writes:

[illegible]

[illegible]

[illegible]

[illegible]

Decrease in seals is attributed to pelagic sealers on untrustworthy data.

untrustworthy data, that it is not possible here to controvert them in logical order without passing in review nearly all the topics relating to seal life which are dealt with in this Counter-Case. The loss of seals killed at sea is greatly exaggerated, and hypothetical figures are thus arrived at for the total number of seals killed at sea, which, as elsewhere shown, are erroneous. The proportion of females and the percentage of those which are still carrying their young are in like manner exaggerated, and the fact that no corresponding decrease of seals at sea has occurred is ignored or denied.

Pp. 187 *et seq.*

Brief examination of these data.

In order to understand the actual character of the contention now advanced on the part of the United States, it is necessary to bear in mind the following material facts:—

1. It is alleged that the seals killed upon the Pribyloff Islands are young males only, say, under varied conditions, males of from 3 to 5 years of age.

2. It is asserted in the Case of the United States that almost all the seals killed at sea are females, and that a vast majority of these are (to the south of Behring Sea) gravid females and (in Behring Sea) nursing females.

3. It has been shown above, and is elsewhere further demonstrated, that the decrease on the Pribyloff Islands had reached serious proportions as early as 1879, and that the date assigned in the Case of the United States (1884), on the authority of retrospective statements only, is erroneous.

4. It is further shown by the official Reports of the United States, that the decrease observed and complained of in 1879 and in following years occurred in "killable" young males.

Data examined by United States [illegible] that [illegible] the year [illegible] data.

It is thus apparent, in conformity with the position assumed in the Case of the United States [illegible] [illegible] of [illegible] must have been [illegible] females [illegible] "killable" [illegible]

[illegible] with the [illegible] 1884 [illegible]

must have been consequent on such killing in 1881 and in preceding years.

Statistics in United States' Case itself show that alleged first decrease was not due to pelagic sealing.

The accuracy of statistics of seals killed at sea given in the Case of the United States is not conceded; but, even assuming these as a basis of argument, it is found that the total pelagic catch in 1879, 1880, and 1881 averaged but 13,200 skins; and, as shown elsewhere, the first pelagic sealing within the limits of Behring Sea (by the United States' vessel "San Diego") was attempted in 1881, while it was not till 1884 that a Canadian vessel (the "Mary Ellen") first entered that sea for purposes of sealing.

United States' Case, p. 266.

British Commissioners' Report, para. 67.

In the years preceding 1879 the whole number of seals killed at sea (still employing the figures given by the United States) had been comparatively insignificant.

Thus, the diminution in "killables" claimed to have been first observed on the islands in 1884, must have been due to the loss of at most 6,600 male pups in the years 1879, 1880, and 1881.* When it is borne in mind that the legal "quota" upon the Pribyloff Islands in each year was 100,000, the unfounded nature of the contention now held by the United States in respect to the effect of pelagic sealing becomes sufficiently apparent.

But if the new contention alluded to (here accepted merely for purposes of discussion) is discarded, and the facts disclosed in the official Reports of the United States are regarded instead, the extraordinary character of the accusation levelled against pelagic sealing and pelagic sealing alone, becomes still more apparent. These facts show that the difficulty in securing the "quota" on the islands was felt as early as 1879, or at a date two years before *any* vessel had entered Behring Sea for purposes of pelagic sealing. If therefore the scarcity of young males then apparent on the Pribyloff Islands be attributed to killing at sea, it must have resulted from such killing in 1875, 1876, and 1877, which in those years (assuming the figures printed by the United States) amounted only to 1,616; 2,012; and 5,700 seals in all; and this entirely outside the area of Behring Sea.

[illegible] this becomes still more [illegible]

It must further be remembered [illegible]

[illegible]

stated on the part of the United States is known to include all skins brought by vessels to Pacific ports, and that of these a considerable proportion (particularly in the earlier years) was derived from raids made upon the Kurile and Commander Islands. Further, that the scarcity of young male seals upon the Pribyloff Islands, so far from establishing general decadence in seal life, has been counter-balanced, according to a great mass of trustworthy evidence, by an increasing abundance of seals at sea.

Reason for difference of British and United States' statistics.

The difference actually existing between the figures given for pelagic sealing in the Case of the United States and in the Report of the British Commissioners, result chiefly from the absence of data respecting the catches of vessels sailing from United States' ports and engaging in this industry. For years previous to 1885, reasonably accurate approximations exist for the catch of Canadian vessels, and from that year onward correct statistics are available for these vessels. The wholly untrustworthy character of the information available in respect to United States' sealing-vessels, cannot be better illustrated than by a reference to the data supplied for the year 1892, and quoted in the Report of the British Commissioners. Therefore, the general statement [illegible] by the British Commissioners is much more accurate than is printed on the part of the United States, which has nevertheless been employed above as a basis of argument.

British Commissioners' Report, Appendix F. Table (C), p. 206.

See p. 207.

It must [illegible] be forgotten in this connection, that the position [illegible] dates fixed in respect to a deserted [illegible] by the United States [illegible] wholly [illegible]. As [illegible] years, the Special Treasury Agents on the Pribyloff Islands had reported [illegible] increase of young seals, and the [illegible] on the contrary assertions [illegible] Report of A[illegible] but [illegible] by late data, together with [illegible] as on the islands themselves, [illegible] to 1891, which are subsequently referred to.

[illegible] U.S. 51st Cong. 2nd Sess. H. Ex. Doc. 31 Part 3, p. 168. Cong. [illegible] Rec. [illegible]

As to the amount of the decrease, [illegible] appears to have been [illegible] at by the Commissioners [illegible] the Case of the United States, there extract [illegible] of the seals is supposed to be as being [illegible] in the near future [illegible] the present [illegible] that it may be assumed that the decrease is [illegible] very great. Thus, in

[illegible] of [illegible]

fact, elsewhere referred to in the Case as "the enormous decrease." The United States' Commissioners write:—

"It may be [illegible] that the population of the Islands is greatly below what it was [illegible] years."

United States' Case, p. 338.

and likewise speak of proximate "commercial extinction" under the present conditions. It is proper to remark, however, that the United States' Commissioners state their belief that—

"most, if not all, of the published estimates of the number of seals formerly found on these islands are exaggerated. . . . In short, one can say with much more certainty of the number of seals now than five years ago, or even two years ago, a comparison by means of numbers is rather an unusual course."

Numerical data untrustworthy

H. R., 51st Cong., 1st Sess., Ex. Doc. 450, p. 41. Also H. R., 50th Cong., 2nd Sess., Report 3834, pp. 332, 333.

Exploding the exaggerated estimates of decrease

The numerical statements thus repudiated by the United States' Commissioners are those of the accredited Agents of their own Government on the Pribyloff Islands; but in distrusting these figures, as well as in attributing exaggeration to the former estimates of number, they are in accord with the British Commissioners, who, writing of the islands alone, and without considering the number of seals met with at sea, say:—

British Commissioners' Report, paras. 52, 357, 368, and especially 365.

"A study of the available published data, made in connection with a personal examination of the various breeding-grounds themselves, has convinced us, however, that some, if not all, the estimates of the total number of seals made in the earlier years of the term of the Alaska Commercial Company have been greatly exaggerated, while reports made in 1890, however accurate in themselves, have, because compared with these overdrawn estimates, exaggerated the amount of the decrease. The alarming fears as to the condition of the breeding islands, based upon reports made in 1890, have fortunately been verified by the facts in 1891 . . . [illegible] by us."

Ibid., paras. 90, 91.

Improvement in 1892

It is important to note that in 1892, so far from there being any continued deterioration of the condition of the "rookeries" on the Pribyloff Islands, the observations of Mr. Macoun show a substantial improvement and an increase in the numbers, particularly of young males, which had during the years 1890 and 1891 been granted a partial immunity from the enormous draft hitherto annually made upon them to fill the "quota."

Appendix, [illegible] p. 151.

Other means of estimating [illegible] employed by United States also untrustworthy.

In the absence of direct numerical data, the United States' Commissioners base their statements as to the *recent* and *great* decrease of seals on the Pribyloff Islands chiefly upon the existence and dimensions of what they call the "yellow-grass zone," or, as named by the British Commissioners, the "grass limit." A rather well-marked zone or limit of this kind, indicated by a different and shorter growth of grass, is observable about most of the rookery or breeding grounds of the seals, as a strip differing in colour from the rest, and extending beyond the edges of the ground in actual occupation by the seals; and, further, in many places, rocks long resorted to by the seals have become polished on the angles and edges.

Examination made by respective Commissioners.

These features attracted the attention of both the British and United States' Commissioners, and were investigated by them. In order to support the particular contention held by the United States, it is necessary to assume that the seals at one and the same time occupied the ground completely to the outer margin of the "grass limit," and that this occurred within recent years. It is naturally easy to find natives, and others who have been upon the islands, and have only lately had their attention called to the matter, expressing the opinion that this was the case; but it is submitted, in view of the facts hereinafter shown, that evidence of this kind is of no practical value.

United States' Case, pp. 339–341. Also British Commissioners' Report, pp. 384–387.

Results arrived at by British Commissioners.

The whole subject above briefly alluded to has been very carefully studied by the British Commissioners, and, though their Report must be referred to for details, it may be stated that they believe the "grass limit" to mark only the maximum average range of oscillation of the breeding rookeries, and show that it is often reached or passed at the present time, particularly during the latter part of the breeding season, by roving masses of seals. They write:—

British Commissioners' Report, paras. 377–395.

Ibid., para. 395. [illegible]

place of the annual details on this subject which an intelligent supervision of the rookeries would have exacted as a matter of prime importance, but which are unfortunately wanting, and can only be in part supplied by incidental allusions or collateral observations which have been preserved."

Confirmed by observations in 1892.

Mr. J. M. Macoun, after a patient and scientific investigation of this subject in 1892, has reached conclusions which fully bear out the statement just quoted. After detailing his observations, he writes :—

"When on the islands I was again and again told that the yellow grass marked the limit to which seals had reached. Admitting this to be true, there is no way of determining what proportion of this ground has been occupied by seals at one time. The lichen-covered rocks prove that much of it has been deserted by them for many years, while there are other parts of it that exhibit unmistakable evidence that seals have been on it within a few years; and in yet other cases seals were seen in great numbers in 1891 and 1892 hauled-out to the extreme edge of the ground defined by yellow grass, and in not a few instances a long way beyond it.

Appendix, vol. i, pp. 150, 151.

"When the rookeries on St. Paul Island were last visited in September, it was found that at all the larger rookeries, such as Reef, Tolstoi, and Polavina, the seals had hauled-out as far as there was any signs of there ever having been before, and in many cases much farther: photographs showing this were taken at all the principal rookeries."

Observations at sea as well as on island must be considered in judging of increase or decrease.

Another matter to which special attention is drawn by the British Commissioners, in respect to the whole number of seals, is the necessity of taking into account observations made at sea, as well as those made upon the breeding-islands, in order to arrive at a true conclusion respecting the increase or decrease of seals on the whole. They state that attention has heretofore been too exclusively given to the islands alone in this respect, and quote much evidence of a general kind, to show that no decrease corresponding with that observed on the islands has been met with at sea. They have also, for the purpose of arriving at greater certainty in this matter, instituted a comparison of the actual number of seals taken at sea relatively to the numbers of boats and the numbers of men employed for five years, 1887 to 1891, both inclusive. The figures thus obtained show a practical uniformity of catch during these years; though at the same time nearly all the evidence shows that the seals are yearly becoming more wary and diffi-

British Commissioners' Report, para. 93.

Statistics show no decrease at sea.

Ibid., paras. 223, 403–406.

Ibid., para. 399.

British Commissioners' Report, para. 407.
Ibid., paras. 408–426. See also Evidence, 1892. Appendix, vol. ii, pp. 140–156.

cult of approach, and the statements of Indian hunters prove that they usually keep further from land than before.

Statistics for 1892 indicate an increase.

The catches made by Canadian sealing vessels in 1892, as compared with those of 1891, show a decreased number of skins in proportion to the number of vessels employed. This circumstance is, however, fully accounted for as a result of the *modus vivendi* of 1892. Notwithstanding the *modus vivendi* of 1891, a considerable proportion of the catch of that year was taken in Behring Sea, but in 1892 scarcely any of the vessels entered Behring Sea, and it is known that the total catch in the eastern part of Behring Sea did not exceed 500 skins. While many of the vessels returned to Victoria on being notified, and thus curtailed their ordinary sealing season, some went across to the Asiatic side; but, in consequence of the time consumed in the voyage over, or of other circumstances, the catch obtained there averaged much less than that made in the eastern part of Behring Sea in 1891, being, in fact, 477 skins per vessel instead of 677.

If, however, the effect of the *modus vivendi* on the catch be eliminated, by instituting a comparison between the number of skins taken on the eastern side of the North Pacific to the south of Behring Sea alone, in 1891 and 1892 respectively, the catch will be found to be actually greater in 1892. In the region specified, the average catch per vessel was, in fact, 119 in 1891, but rose to 187 in 1892, and this in face of the employment of a larger number of Canadian vessels. There is, therefore, good reason to believe that there has been a considerable increase in the number of seals met with at sea in 1892 as compared with 1891.

[illegible] United States' [illegible] the [illegible] relation to [illegible]

United States' Case, pp. 169–172.

It will be noted, that nearly all the statements posted in the place of the [illegible] keeping the scarcity of seals in the open sea, are derived from Indians, who so [illegible] chiefly that obtained in canoes in the vicinity of the coast, and therefore corresponds [illegible] with that given by similar witnesses to the British Commissioners, and [illegible] if any, real information as to the [illegible] of seals at sea.

These Indians, inhabiting the coast of the continent, are in [illegible], if not in all cases, necessarily [illegible] shoreline [illegible];

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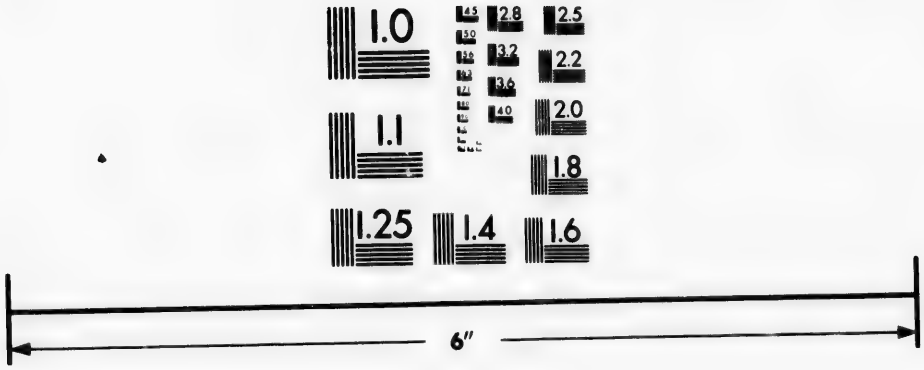

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and, for this reason, the fact that they attribute any scarcity of seals observed by them to the acts of their rivals, the pelagic sealers, (of which besides their own hunting they are alone cognizant,) must be accepted with great reservation, as evidence respecting the effects of pelagic sealing.

It is further to be remarked, that the evidence obtained from Indian witnesses, and printed in the Case of the United States, appears to have been either very incorrectly translated or very imperfectly set down. Thus, for example, of twelve Indians examined by the United States' Agents at Barclay Sound, eight have since been examined by Mr. Sherwood, and on important points contradict the statements previously attributed to them.

Appendix, vol. ii pp. 140–165.

Method practised on the islands drives the seals to sea.

The greater proportionate number of seals now met with at sea, as compared with those on the breeding-islands, is largely explained by the disturbances to seal life incident to the methods practised on the islands; of which evidence is quoted by the British Commissioners, and it is said that—

British Commissioners' Report, paras. 427–440.

"the general effect of these changes in habit of the seal is to minimize the number to be seen at any one time on the breeding islands, while the average number to be seen at sea is at least proportionately, though perhaps in fact of a general decrease in total number of seals, not absolutely, increased."

Ibid., para. 445

Late evidence shows increase and decrease of seals.

It will, in addition, be found, that in the large mass of testimony collected in 1892, and presented in the Appendix to this Counter-Case, in reply to United States' contentions, both whites and Indians are almost unanimous in denying the existence of a decrease of seals at sea; and that many experienced men affirm their greater abundance. That, while the Indians sealing from the coast believe the seals to be less numerous in proximity to the shores, they attribute this in part to a change in habits resulting from persistent hunting, in part to the absence of large runs of small fish, such as herrings. When small fish are abundant on the coast, the seals are more numerous, and are found even to enter the inlets and bays in pursuit of such fish.

General conclusions on cause and amount of decrease of seals.

Finally, in reviewing the whole of the facts and evidence collected by them on the nature and amount of the decrease in the fur-seals of the North Pacific, the British Commissioners write that they are led to believe—

"that there has been, in the main, a gradual reduction in

Ibid., para. 94.

the total volume of seal life in the North Pacific, dating back to a period approximately coincident with the excessive and irregular killing on the Pribyloff Islands in 1867 to 1869, but that this reduction in total volume has not in late years been nearly so rapid as the observed decrease in numbers upon the Pribyloff breeding islands in the corresponding years."

So large a part of the Report of the British Commissioners is devoted to the subjects included under the contentions in the Case of the United States, which stand at the head of this chapter, that it is not here considered necessary to give more than a brief abstract, in which the conclusions arrived at occupy the principal place. An examination of the Report itself is respectfully invited.

The facts observed by Mr. Macoun in 1892, together with the evidence obtained from a large number of practical and experienced sealers, further tend to bear out the conclusions arrived at by the British Commissioners in every respect.

It is submitted that the facts above stated demonstrate that the commencement of the decrease of seals on the Pribyloff Islands had been distinctly observed upon these islands for some years before pelagic sealing developed to any substantial degree, and many years before it could have had any practical effect on the number of killable males on the islands.

CHAPTER XI.

Allegations made in the Case of the United States against Pelagic Sealing, and Replies thereto.

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 174—
"It has also been shown that the decrease in the seals took place primarily among the female portion of the herd."

(2.) United States' Case, p. 177—
"The sole cause of the present depleted condition of the Alaskan seal herd is open-sea sealing."

(3.) United States' Case, p. 187—
"Open-sea sealing, the sole cause of the enormous decrease noted in the Alaskan seal herd in the last few years, and which threatens its extermination in the near future. . . . ."

(4.) United States' Case, p. 188—
"About 1885 a new method of hunting was introduced which has been the great cause of making pelagic seal hunting so destructive and wasteful of life—the use of fire-arms."

(5.) United States' Conclusions, p. 296—
"That this decrease began with the increase of such pelagic sealing, and that the extermination of this seal herd will certainly take place in the near future, as it has with other herds, unless such slaughter be discontinued."

(6.) United States' Case, p. 218—
"The indiscriminate slaughter of seals in the waters of the Pacific Ocean and Bering Sea cannot fail to produce a result similar to that observed in the southern hemisphere, where the fur-seals have, except at a few localities, become, from a commercial point of view, practically extinct."

(7.) United States' Case, p. 196—
"When the estimate, therefore, is placed at sixty-six seals unsecured out of every 100 killed with fire-arms, the probability is that the percentage lost is even more."

(8.) United States' Case, p. 197—
"From 80 to 90 per cent of the seals killed in the open sea are females, the majority of which are either pregnant, or having been delivered of their pups, are the sole means of sustenance for their offspring."

(9.) United States' Case, p. 209—
"They (the cows) go into the water in search of food, in order that they may be able to supply their offspring with nourishment. And as has been shown, they often go from 100 to 200 miles from the islands on these excursions. It is while absent from the rookeries feeding that they fall a prey to the pelagic seal hunter."

(10.) United States' Case, p. 212—
"When sealing vessels began to enter Bering Sea in pursuit of the seal herd (1884–85), at that same period dead pup seals on the rookeries first drew the attention of the residents of the Pribilof Islands."

(11.) United States' Case, p. 216—
"Between 80 and 90 per cent. of the seals taken are females; of these at least 75 per cent. are either pregnant or nursing."

(12.) United States' Case, p. 297—

"That pelagic sealing is an illegitimate, improper, and wasteful method of killing, is barbarous and inhuman in its immense destruction of the pregnant and nursing female, and of the helpless young thereby left to perish."

(13.) United States' Case, p. 190—

"The White hunter . . . . loses a great many seals which he kills or wounds."

(14.) United States' Case, p. 155—

"It is a conservative estimate to say that such hunters lose two out of every three seals shot by them."

Summary of British Reply.

Pelagic sealing in the North Pacific is in no way analogous to the methods employed in the Southern Hemisphere.

The method of killing seals ashore on the Pribyloff Islands are similar to those by which depletion has been brought about in the Southern Hemisphere.

The actual loss of seals shot at sea, due to the sinking of the body before it can be recovered, is very small.

The number of fatally wounded seals which escape capture is also very small. The substitution of the shot-gun for the rifle, by rendering close approach to the seal necessary, has greatly reduced this and other losses.

The percentage of females alleged in the Case of the United States to be taken at sea, is greatly exaggerated. The statements there made depend chiefly on the examination of cured skins. But it is in general impossible to distinguish the sexes of the animals from which they are taken.

The killing of animals of the female sex yielding products of commercial value is not *per se* reprehensible; and the larger proportion of female seals found at sea in late years is the direct result of the excessive killing of males upon the breeding-islands.

The killing of gravid or nursing females at sea, in common with other sources of loss incident to pelagic sealing, is much exaggerated in the Case of the United States; but the killing of such females can, and should be, obviated as far as possible in any common scheme of Regulations agreed upon for the seal fishery as a whole.

The contention that young seals have died from starvation upon the Pribyloff Islands, in consequence of the killing of their mothers at sea, is untenable, and it is based upon a considerable mortality of "pups" on St. Paul Island in 1891. The death of young seals upon the islands during the breeding season has long been known to occur, and has always heretofore been explained by other obvious causes.

The circumstances attending the mortality of young seals in 1891 show that it cannot be attributed to the killing of the mothers at sea. The recurrence of an equal mortality in 1892, when practically no seals were killed in Behring Sea, fully confirms this conclusion.

The theory advanced in the Case of the United States respect the cause of death of the "pups"; depends on the assumption that the females go to very great distances from the islands in search of food while suckling, which is here disproved; and it is further denied by the best authorities on the fur-seal.

Before discussing the main contentions of the United States as to pelagic sealing, it will be convenient to comment upon the parallel attempted to be drawn in the two passages last above cited from the United States' Case, between pelagic sealing and the results of sealing in the Southern Hemisphere.

No parallel can legitimately be drawn between the slaughter of seals in the Southern Hemisphere and pelagic sealing in the North Pacific.

The destruction of seals in the south is alluded to repeatedly and at length in the Case of the United States, as though connected in some way with pelagic sealing.

United States' Case, pp. 218, 296. Ibid., Appendix, vol. i, p. 393, *et passim.*

In view of the attempts thus made to parallel the conditions and probable results of pelagic sealing in the North Pacific, with the destruction of fur-seals in the Southern Hemisphere, it cannot be too clearly understood that there is nothing in common between the two modes of taking seals. The hunting of seals at large on the sea-surface has never prevailed in the Southern Hemisphere; and though, because of the necessity of reaching the insular resorts of the seals there by sea, we hear of a "sealing fleet," the method of taking seals practised has been to land upon the shores where the breeding places of the seals are found, and there to slaughter the animals with clubs.

British Commissioners' Report, para. 65.

On the other hand, the actual mode of killing the North Pacific seals on their breeding-islands, and when congregated there for purposes connected with reproduction, is analogous to, and may be considered as but a modified form of the practices employed in the Southern Hemisphere; from which, though some of the more wasteful, and therefore the more objectionable, features have been eliminated, it has been directly derived. In fact, it is a matter of record that Captain Morgan, one of the two prime movers in the matter of arranging for the lease of the Pribyloff Islands to a Company, and who was a party to the enormous slaughter of 1868, had gained his experience in the slaughter of fur-seals in the Southern Hemisphere; and that Mr. C. A. Williams, who, after the organization of the Company leasing the islands became one of its principal shareholders and managers, had already long been identified with the indiscriminate slaughter of fur-seals in the Southern Hemisphere.

The methods practised on the Pribyloff Islands are similar to those practised in the Southern Hemisphere.

H R., 50th Cong., 2nd Sess., Report 3883, p. 88.

Elliott's Census Report, p. 25.

Mr. Williams himself acknowledged the similarity existing between the methods first practised on the islands and those employed in

the Southern Hemisphere, and, according to Mr. Hutchinson, who was also a party to the enormous slaughter of 1868:—

Elliott's Census Report, p. 88. H. R., 44th Cong., 1st Sess., Report No. 623, p. 133.

"Morgan's men killed old seals, cows, or anything they came across. The idea was to get all they could."

Pelagic sealing is a new industry of local origin.

Respecting the origin of pelagic sealing and its total diversity from any mode of sealing practised in the Southern Hemisphere, the British Commissioners have accumulated many facts. They write:—

British Commissioners' Report, para. 65.

"It may here be particularly noted that the industry [pelagic sealing] thus developed in consequence of peculiar local conditions, had never elsewhere appeared as a factor of commercial importance, and that in so far as we have been able to discover by inquiries specially directed to this point, no vessels carrying hunters for the purpose of taking seals at large on the sea-surface had ever before frequented any seas anywhere. The vessels sailing from New England and from some British ports, which formerly in considerable numbers, made sealing-voyages to the Southern Hemisphere (para. 834 *et seq.*), slaughtered the seals there only on shore and at the breeding-places, and this without any respect for the rights of territorial dominion or property over the islands they frequented. The 'sealing fleet' employed in the Southern Hemisphere has, therefore, at no time been of the same character with that engaged in pelagic sealing in the North Pacific."

Long before its development the seals on the Pribyloff Islands had on several occasions become much reduced.

Ibid., paras. 782–806

Perhaps the most important point omitted from the United States' Case, in connection with the contention now held in respect to the effect of pelagic sealing, is the fact that on more than one occasion during the Russian régime, and many years before any seals were taken at sea, the supply of seals on the Pribyloff Islands fell so short that commercial extermination actually threatened. In these recorded cases the dearth was due either to want of care and proper restrictions in the slaughter on the islands themselves, or to some natural cause, such as that of climatically unfavourable years. It is the result of experience that, by means of excessive slaughter or disturbance on the islands, the seals may without difficulty be seriously reduced in number, or driven away to sea or to new breeding resorts, while no such experience is available to substantiate the new contention advanced as against sealing at sea.

In his statement, printed in the Appendix to the United States' Case, Professor Huxley, on

the subject of the possibility of destroying the seals when on these breeding-islands, writes:—

"In the case of the fur-seal fisheries, the destructive agency of man is prepotent on the Pribyloff Islands. It is obvious that the seals might be destroyed and driven away completely in two or three seasons."

United States' Case, Appendix, vol. i, pp. 411, 412.

The British Commissioners record a very similar opinion on this subject, and add:—

"In sealing at sea the conditions are categorically different, for it is evident that by reason of the very method of hunting the profits must decrease, other things being equal, in a ratio much greater than that of any decrease in the number of seals, and that there is therefore inherent an automatic principle of regulation sufficient to prevent the possible destruction of the industry if practised only at sea."

British Commissioners' Report, paras. 117, 118.

It is apparent from the quotations placed at the head of this chapter, that it is maintained on the part of the United States that pelagic sealing is the *sole* cause of the decreased number of seals now found on or about the Pribyloff Islands; and, as shown elsewhere, that the slaughter of seals upon the islands themselves has had no effect in bringing about such decrease.

It is, however, maintained in the United States' Case that pelagic sealing is the sole cause of decrease observed on Pribyloff Islands.

In support of this proposition, a lengthened indictment of the methods and results of pelagic sealing is framed in the Case of the United States, of which the following are the material allegations:—

Pelagic sealing is there condemned on several grounds.

(*a*.) That of fur-seals killed at sea with fire-arms at least 66 per cent. are lost, and that this loss occurs in two ways: (1) by the seals sinking before they can be secured, and (2) by fatally-wounded seals escaping.

United States' Case, pp. 190, 196.

(*b*.) That from 80 to 90 per cent. of the seals killed at sea are females, and that of these at least 75 per cent. are either pregnant or nursing.

Ibid., pp. 197, 296.

(*c*.) That, in consequence of the killing of nursing females at sea, dead "pups" have been found in increasing numbers on the Pribyloff rookeries every year since pelagic sealing began in Behring Sea, and that such "pups" died from starvation.

Ibid., p. 212.

These allegations directed against pelagic sealing are employed by the United States to support the further statement—

It is stated to be illegitimate, improper, barbarous, and inhuman.

"that pelagic sealing is an illegitimate, improper, and wasteful method of killing, is barbarous and inhuman,"

Ibid., p. 297.

and that—

United States' Case, p. 297.

"It is wholly destructive of the seal property and of the industries and commerce founded upon it."

But all the allegations on which this denunciation are based are untrue, or greatly exaggerated.

Ibid., pp. 147, 296, *et passim.*

While it is not denied that there is or may be a measure of truth in some of the contentions thus held by the United States, it is maintained in the light of evidence collected, and more particularly as the result of the investigations of the British Commissioners, that they are of a greatly exaggerated character.

(*a.*) *That of fur-seals killed at sea with fire-arms at least 66 per cent. are lost, and that this loss occurs in two ways:* (1) *by the seals sinking before they can be secured, and* (2) *by fatally-wounded seals escaping.*

Evidence produced to show great loss of seals by sinking, before the date of British Commissioners' Report, wholly untrustworthy.

As to the first of the above contentions, which is connected with the actual loss of seals killed at sea by sinking after they are shot and before they can be recovered by the hunters:—For some time previous to the preparation of the Report of the British Commissioners, many statements as to the extraordinary proportion of seals lost at sea had found currency, more particularly in the press of the United States, which were again and again published as though possessed of the utmost authenticity, and they had in consequence come to be regarded as accurate by the public. It was thus natural that the British Commissioners should devote special attention to this point, and they made it their business to seek out all the actual or alleged facts on which such sweeping statements were based. They have referred to all those which a thorough search of the published documents enabled them to discover up to the date in question, and it will be observed, on inspection of these statements, that not one of them depends on personal experience; but, on the contrary, that all are merely given by their authors as matters of opinion, while in all but a single instance, it is not even claimed by the author of the statement that he ever saw a single seal killed at sea. Percentages and ratios are thus alone spoken of, and actual numbers are not known, or if known are not quoted.

British Commissioners' Report, paras. 82, 613, 614.

Ibid., para. 614.

Remarks of the British Commissioners on this evidence.

The British Commissioners write:—

Ibid., para 615.

"Nothing more precise than the statements just quoted, every one of them made by those presumably interested in or engaged in, protecting the breeding-islands, but with-

out personal experience in this matter, has been found as authority for the theory which has been so diligently propagated, that excessive waste of seal life results from the practice of pelagic sealing."

In opposition to the hypothetical statements above referred to, the British Commissioners adduce a mass of expert testimony, which will subsequently be alluded to, and which, without a single exception, entirely and specifically contradicts the theory alluded to.

In 1892 new evidence advanced by the United States on this matter.

At a later date, however, in 1892, the United States has obtained from various sources a considerable number of affidavits and statements intended to bear out the theory of excessive losses of seals at sea, all of which have seen the light for the first time in the Case of the United States, or among the documents appended to it, and respecting the character and value of which some critical remarks will subsequently be made.

The United States' Commissioners are not quoted in support of the statement on this subject in the United States' Case.

The United States' Commissioners present no direct evidence on this subject, and their opinion is not quoted in support of the assertions made in the Case itself of the United States. Professor J. A. Allen is, however, prominently cited, being upon this as upon most other subjects perfectly definite, though claiming no personal experience or special sources of information in addition to those acessible to the public previously, or now submitted in connection with the Case of the United States. He characterizes statements to the effect that not more than 5 per cent. of seals shot are lost as "absurd," and goes on to say that—

United States' Case, pp. 370, 371.

Professor Allen's definite statement.

Ibid., p. 191.

"only such seals as are instantly disabled can be secured, and even many of these must be lost, since the specific gravity of a dead seal is greater than that of the water in which it is killed."

Ibid., Appendix, vol. i, p. 409.

He proceeds to argue that further great losses must arise from wounded seals which are not taken, and concludes that about 60 per cent. of the seals killed at sea are lost by sinking before recovery alone.

The facts are opposed to the contention (7.), and to Professor Allen's statement.

It is only by ignoring the well-known facts as to the recovery of fur-seals which have been shot in the open sea, that the argument that they sink immediately can possibly be brought forward.

Evidence of Mr. Alexander.

With reference to this question, Mr. A. B. Alexander, Fishery Expert to the United States' Fish Commission, says:—

United States' Case, Appendix, vol. ii, p. 355.

"In sleeping, the seal's head is to leeward and the steerer will endeavour to work the boat so as to approach from that direction and give the hunter an opportunity to shoot the seal in the back of the neck. When so shot they take longer to sink than when shot in the face; that is, if a seal bobs up in the water, its body being in a submerged and horizontal position, and if it be instantly killed by the shot it will at once sink. It is then that the 8 or 10 foot gaff is used to recover it. It has been my observation that the rapidity with which seals sink is influenced by several conditions. A pregnant female will sink less quickly than a male of equal size. If a seal be shot at a time when the air is well exhausted in the lungs, it will sink more quickly than if killed when the lungs are inflated. If a seal is asleep and shot in the back of the head it will float for several minutes, thus enabling the hunter to secure it."

Facts respecting the killing and recovery of seals at sea.

Appendix, vol. ii, pp. 7–10

As regards the length of time for which fur-seals float after being shot at sea, hunters are practically unanimous in saying that, in the great majority of cases, they always float for a sufficiently long time to enable them to be secured, if they are looked after at once after being shot. Sometimes, however, a second seal will be seen close at hand, and may be fired at before the endeavour to secure the first, which in the meantime occasionally sinks. Under ordinary circumstances, a seal is picked up as soon as possible after it is shot, and nothing more is known of the length of time it would float than that it floated until secured. Seals are, moreover, occasionally shot from the deck of the schooner itself. If the vessel is under way, a pole heavily leaded at one end and with a small flag attached to the other, is at once thrown overboard, which marks the position of the seal. A boat is lowered as soon as possible, and, with very few exceptions, the seal is secured, even under these circumstances.

Character of boats employed in sealing.

The boats employed in sealing are light, swift craft, with bow-shaped ends, and the oarsmen sit one facing each way, ready, at a word from the hunter, to make after any seal he may hit.

Circumstances under which seals killed at sea are lost.

Ibid., p. 7–13

It is admitted by all the pelagic sealers, that a small percentage of seals is lost as above described, or in other ways, as, for instance, when a wounded seal goes off to windward faster than it can be followed by the boat in a choppy sea. Sleeping seals seldom, if ever, sink when shot, and probably three-fourths of the seals shot are "sleepers." When "travellers" happen to be shot through the wind-pipe they generally sink, and, in consequence of this fact, experienced

sealers generally try to shoot such seals from behind. Such seals as do sink, however, sink slowly, the specific gravity of the body being only slightly greater than that of the water, even when the breath has escaped. Thus, it is generally possible to gaff the carcass, and, in ordinary "sealing weather," the precise spot where the seal has been killed is easily found by the bubbles rising to the surface, or by the blood staining the water.

General statements as to proportion of seals thus lost by white hunters.

The evidence of a general kind actually quoted or personally obtained by the British Commissioners, in regard to the loss of seals killed at sea by white hunters, may be summarized as follows:—

British Commissioners' Report, paras. 616, 622.

Captain J. D. Warren.—Not over 6 per cent. lost or escape.

Mr. W. Fewings.—Average loss does not exceed 6 per cent.

Captain H. F. Steward.—Lower coast, not over 6 per cent. Alaskan coast and Behring Sea not over 4 per cent.

Captain W. O'Leary.—Does not exceed 6 per cent., and sometimes much less.

Mr. W. Munsie.—Probably not over 2 per cent.

Mr. A. R. Milne.—At most only 6 per cent.

Mr. C. J. Kelley.—Average loss less than 3 per cent.

Captain W. Petit.—Loss not more than 5 per cent.

Captain W. E. Baker.—Loss not more than 3 per cent.

Mr. C. N. Cox.—Loss 4 or 5 per cent.

Captain T. N. Magnesen.—Average loss 3½ per cent.

Mr. H. Crocker.—Loss 3 to 4 per cent.

Mr. G. Roberts.—Loss 3 to 5 per cent.

Mr. R. Thompson.—Loss 3 to 5 per cent.

Mr. M. Lundberg (with three other sealers), concurred in stating that a man losing 2 out of 30 killed would be considered a poor hunter. Say 6 per cent.

Captain Lavender.—Not over 7 per cent. lost.

Sealers' Association of Victoria.—Loss averaged below 6 per cent.

Captain of "Eliza Edwards."—"Green hands" might lose 25 per cent. With experienced hunters loss might reach 5 per cent.

Appendix, vol. ii, pp. 7–10.

The following additional statements of the same kind, including experience in 1892, are found in the affidavits appended to this Counter-Case:—

Captain C. Le Blanc.—Never more than 4 or 5 in 100.

Captain R. O. Lavender.—Not more than 1 in 20.

W. O'Leary.—From 1 to 5 per cent.

Captain Laughlin M'Lean.—About half of 1 per cent.

J. Shields.—First years about 5 per cent.; 1891–92 less than 1 per cent.

Captain T. Morgan.—Between 4 and 5 per cent.

Captain R. McKiel.—Of 1,700 seals taken 40 lost (2·3 per cent.)

Captain J. W. Todd.—Not more than 4 in 100

J. J. Buckingham.—Not 1 in 100

Captain H. B. Jones.—Not more than 3 in 100.

C. C. Grant.—Not 1 in 1[illegible].

Captain J. Gaudin.—Not 5 per cent.

Captain C. F. Dillon.—Not more than 5 per cent.

Captain G. Scott.—5 per cent.

Captain G. Webster.—3 per cent.

Captain C. Lutjens.—5 per cent.

C. Hastings.—Not 5 per cent.

Captain J. S. Worth.—Between 10 and 15 per cent., including wounded seals.

Captain C. E. Meekler.—5 per cent.

W. F. Upson.—10 per cent.

C. Crocker.—From 5 to 10 per cent.

H. Conners.—5 per cent.

J. W. Crow.—5 per cent.

All the above statements of course refer to the killing of seals by means of fire-arms, and almost exclusively to killing with shot-guns. The rifle is now seldom used by White hunters, and the spear never. The spear is still employed by some of the Indian hunters, but the shot-gun is now more commonly used by them also, and by some tribes has been regularly employed for many years (by the Haidas since 1846). Most of the statements noted below in connection with numbers lost by Indian hunters thus also refer to seals killed with guns.

British Commissioners' Report, paras. 584, 604.

Ibid., paras. 539, 542, 548, 552, 554, 557; also Elliott's Census Report, p. 65: compare pp. 187, 188, United States' Case.

General statements respecting the proportion of seals lost by Indian hunters.

In order to understand the bearing of these statements, it must be noted that the Aht Indians of Vancouver Island and the Makah Indians of Cape Flattery, are the only ones systematically, and to a large extent, employed in pelagic sealing proper. The statements of Whites refer to Indian hunters of these tribes employed by them. The Sitka and Tshimsian hunters, to whom a high percentage of loss is attributed, in so far as they engage in seal hunting, do so almost exclusively in their own canoes from the shore. The statements referring to these Indians are quoted by the British Commissioners, but have no direct bearing on the losses of pelagic sealers.

British Commissioners' Report, paras. 538, 551, 556.

Ibid., para. 626.

The statements respecting seals lost by Indians may be summarized as follows:—

Ibid., paras. 617, 626.

Mr. W. Fewings.—Loss by Indians not 6 in 1,000.

Captain H. F. Steward.—Very few lost (with spear).

Captain W. O'Leary.—None, or very few (with spear).

Captain W. Petit.—Loss 1 per cent.

Mr C. N. Cox.—Loss 1 per cent.

Mr. A. Laing.—Loss 10 per cent.

Captain W. Cox.—Loss *nil* (with spear).

Judge J. G. Swan.—All recovered, whether speared or shot.

Aleut Hunters.—Loss *nil*, whether shot or speared.

Sitka Hunters.—Loss, perhaps, 10 to 20 per cent. of seals shot

Haida Hunters.—Seldom lose any.

Mr. A. Mackenzie.—Very few, indeed, lost of seals shot.

Mr. R. H. Hall.—Very few lost.

Mr. R. Cuningham.—Loss may reach 20 per cent. in the case of Tshimsian hunters.

Makah Hunters.—With spears, loss *nil*. With guns, perhaps 2 to 4 per cent.

It is fair to state that most, though not all, of the statements heretofore given have been derived from persons more or less directly interested in pelagic sealing, from whom alone it is possible to obtain the results of extensive actual experience on the subject of losses at sea. The statements are, moreover, also chiefly of a general character, but in order to further test the accuracy of such statements, the British Commissioners proceeded to collect facts as to the actual number of seals shot and recovered, or shot and lost by individual hunters in certain years, and in this manner succeeded in actually accounting for nearly 10,000 seals shot by white hunters. In tabulating these, a general agreement is found as between the percentages deduced from the individual statements, and the average loss reaches but 4 per cent.

General statements checked by numerical statements.

At the request of the British Commissioners, the masters of a number of sealing vessels directed their hunters to keep an account of the seals lost by sinking in securing their catches. This was done by many of the hunters, and from their sworn statements regarding their catches in 1892 and previous years an additional Table has been prepared, which shows that the average loss on 39,879 seals shot by white hunters was about 3 per cent. Where a general and a numerical statement have both been made, it is found that the general statement as to loss almost invariably exceeded the numerical, so that when a general statement only has been made, it probably exceeds the actual loss.

The average loss by sinking of seals killed at sea shown to be about 3 or 4 per cent. only.

See Appendix, vol. ii, p. 6.

Similar treatment has also been accorded to such actual numbers as could be obtained from

Indian hunters, and though the whole number of seals accounted for in this case is small, and therefore not so satisfactory as evidence, so far as it goes this is in general accord with statements made.

British Commissioners' Report, para. 627.

The assumption that the fur-seal when killed at sea sinks immediately, contradicted by facts.

Ibid., paras. 629, 630.

In concluding their consideration of this subject, the British Commissioners point out how completely the recorded facts in the case contradict the *à priori* assumption that the fur-seal does, and must, sink immediately when shot. They state that such an assumption is based chiefly on the circumstances that various species of hair-seals generally thus sink, but show (1) that the two groups of animals differ greatly in respect to proportional weight of skeleton and size of lung, and (2) that when fat, even hair-seals are well known to float when killed. Two hair-seals shot near Middleton Island, Alaska, in the summer of 1892, in Mr. Macoun's presence, both floated till the bodies were recovered. In fact, a great number of such seals are annually taken both in the Labrador and Greenland fisheries by shooting in the water.

Appendix, vol. i, p. 136.

The assertion that large numbers of wounded seals escape and die is so vague as scarcely to admit of argument.

As to the further assertion that large numbers of seals, being merely wounded when fired at, escape and subsequently die; it is obviously difficult to meet such a statement by direct evidence of a precise kind: for a seal fired at and not hit, or one but slightly wounded, naturally dives instantly, and does not again come to the surface for a long time, and then at a great distance from the hunters. Seals seriously wounded are almost certain to be recovered, for they either remain struggling on the surface, or travel slowly and rise often, and are easily overtaken.

Appendix, vol. ii, pp. 11-13.

The adoption of the shot-gun necessitates a close approach to the seal rendering loss infrequent.

Moreover, the general adoption of the shot-gun in place of the rifle, necessitating a comparatively close approach to the seals, minimizes the chances of missing the animal; while the evidence obtained from sealers shows that in practice they make sure of hitting by firing only when at close quarters.

Contention that the escape of some wounded animals renders shooting illegitimate, unprecedented.

It is not known that the escape of a certain proportion of any wild animals shot at and wounded, or killed and lost, has ever heretofore been advanced as a reason for the abandonment of the killing of such animals with the gun. The logs of sealing schooners printed in the Appendix are sufficient to show that, for any

Appendix, vol. ii, pp. 187 *et seq.*

boat employed in sealing, each seal taken involves, on the average, many hours of rowing and exposure at sea. There is, therefore, no question of a promiscuous and reckless slaughter among dense droves or schools of seals. The hunters are themselves remunerated on a principal of shares depending on the number of seals taken, and every possible precaution against loss is, therefore, naturally employed by the men so engaged.

Precautions taken to recover all seals shot.

The subjoined statements with regard to the securing of wounded seals, contained in the affidavits by practical sealers, are here given in summarized form; but many details are incorporated in the depositions themselves, which should be referred to in order to appreciate the means taken by hunters of knowing the amount of such losses, and also with the trouble often taken to secure a wounded seal:—

Summary of evidence on this point.

Appendix, vol ii, pp. 43-139.

J. Townsend.—Very few wounded seals are lost.

Captain A. Douglas.—Badly wounded seals almost certain to be got.

G. Roberts.—Wounded seals are either captured or live.

M. Ryan.—Very few. None worth speaking of.

W. T. Bragg.—Chances of getting a badly wounded seal are good.

Captain O. Buchholz.—Does not think that any of the seals wounded by him would die.

Captain W. O'Leary.—Not many.

W. Cowie.—Very few.

J. Brown.—Of 20 or 25 seals wounded by him not half-a-dozen would die.

W. De Witt.—Those badly wounded I always get. Those lightly wounded do not die.

Captain L. McLean.—Very few indeed.

J. H. Hanke.—Very few.

J. Shields.—Very few in rough weather. None in calm weather.

O. Scarf.—Very few, if any.

F. W. Strong.—Remembers only one or two instances of a wounded seal escaping. Has taken 930.

A. Mathison.—Very few.

W. Shields.—The number is very small indeed.

G. A. Williams.—Very few.

C. Locke.—Very few.

E. Ramlose.—Very few.

I. O'Quinn.—Took in 1892 210 seals, and wounded 2 that escaped him.

Captain R. McKiel.—The number is very small.

Captain E. P. Miner.—Very few. Not 1 in 100.

J. Hall.—Has wounded some seals, but got most of them; the others would live.

N. Morrison.—Always gets badly wounded seals in fair weather. Of slightly wounded they no doubt get well

Captain V. Jacobsen.—Very few.

J. Christian.—A few wounded seals escape, and a few of these may die.

M. McGrath.—Is not sure that any would die.

W. Heay.—In taking 168 seals wounded not more than 5, some of which may have died.

E. Cantillion.—Not many.

C. O. Burns.—Only 10 escaped wounded, and those only slightly.

J. McRae.—Wounded 12 or 15 in 1892: some might die.

L. McGrath.—Not more than 10 wounded in 1892, and thinks all would live.

J. Brown.—Very few are wounded.

C. Francis.—Wounded a few, but got most of them afterwards.

J. Figueroa.—Wounded 6 or 7 in 1891.

W. F. Roland.—Always gets badly wounded seals; those that escape are not likely to die.

A. W. Roland.—Very few badly wounded seals escape.

J. Matthews.—Wounded a few, but got most of them.

N. Bonde.—Wounded a few.

A. McGarca.—Not more than 1 in 50 wounded seals will die afterwards.

R. S. Findley.—Very few.

T. Garner.—Very few.

J. Krapt.—Badly wounded seals nearly always got.

G. C. Gerow.—Not many.

R. Hope.—Sure of getting badly wounded seals.

A. Sinclair.—Wounded 8 or 9, but none badly enough to cause death.

W. Edwards.—Seals that are bedly wounded always got.

G. F. French.—Not many.

W. M. Christian.—1 or 2 might have escaped and died.

P. Jolibis.—Very few.

T. O'Leary.—Took 240 seals in 1890, and wounded not more than 15 that got away.

L. McGraw.—Wounded 10, but doesn't think any would die.

H. F. Steward.—Percentage of wounded seals that escape is very small.

D. A. Lewis.—A mortally wounded seal does not often get away.

Summary of evidence as to distances at which seals are shot.

With reference to the distance at which seals are shot at, as bearing on the chances of losing wounded seals, the following statements referring to the actual practice of hunters may further be cited:—

British Case, Appendix, vol. iii, "United States No. 2 (1891)," pp 355-357.

J. Wilson.—Shot seals at a range of from 10 to 15 yards (p. 355).

W. Fewings.—General range for rifles not over 50 yards, but few hunters attempted that range. In getting 400 in 1887 failed to capture about 25 shot at, or killed, or wounded, but which escaped (p. 355).

Captain J. D. Warren.—Sleepers are shot at from 10 to 15 yards range, "feeders" from a few feet to 100 yards, though few are fired at at that distance (p. 355).

Captain H. F. Steward.—I generally take 10 per cent. additional ammunition for waste shot, that is, if calculating on a catch of 3,000 seals, take ammunition for 3,300 shots. This is double the excess the hunters would consider necessary, and I never knew that percentage of waste shot to be used (p. 356).

G. Howe.—Uses shot-gun principally, rifle only for long range, say, 30 to 60 yards (p. 357).

British Case, Appendix, vol. iii, "United States No. 3 (1892)," pp. 167, 191.

Captain C. J. Kelley.—Average range for sleeping seals 10 to 20 yards, for travelling seals 10 to 30 yards (p. 168).

Captain W. Petit.—Average range for sleeping seals 10 to 20 yards; 10 to 30 yards for "travellers" (p. 169).

Captain W. E. Baker.—Ten yards is a safe shooting distance at "sleepers," and 10 to 30 at "travellers" (p. 173).

Captain C. N. Cox.—Fifteen yards, shooting distance at sleeping seals (p. 175).

Captain A. Bissett.—Shoots at sleeping seal when 20 to 30 feet from it, and at a traveller when 25 to 30 yards away (p. 177).

Captain T. W. Magnesen.—Twenty-five yards at "sleepers" and 45 to 50 at "travellers" is safe shooting distance (p. 178).

H. Crocker.—The usual distance for shooting at a sleeping seal is about 20 feet (p. 180).

G. Roberts.—Shoots at sleeping seals when 20 to 30 feet from them, and at "travellers" when from 25 to 30 feet [yards] from them (p. 181).

The following additional statements on the same subject, including experience in 1892, are contained in the affidavits of hunters and boat-steerers subsequently obtained:—

J. Townsend.—Three years a hunter; shoot sleeping seals at 15 yards range, and has killed a "traveller" when 60 yards away, but seldom shoots at a seal when that distance away.

Captain A. Douglas.—Eight years' experience; shoots at a sleeping seal when 40 or 50 feet from it.

Appendix, vol. ii pp. 43–139.

G. Roberts.—Four years' experience—two as hunter; shoots sleeping seals at from 5 to 15 yards range, and never lost but one seal shot at while sleeping, and that was by going after another seal and leaving the first too long. He shoots at a travelling seal at from 20 to 50 yards range.

M. Rose, who has been sealing ten years, shoots at sleeping seals when from 12 to 15 yards from them.

J. S. Fox[illegible]—Four years' experience as hunter, shoots at sleeping seals when 12 to 15 yards from them, and at travelling seals when 30 to 40 yards away.

W. T. Boggs.—Eight years' experience; shoots at sleeping seals when about 20 feet from them, and gets as close as possible to a "traveller."

Captain O. Buchholz.—Three years' experience; master mariner, but hunts as well; shoots at sleeping seals when within 15 yards of them, and travellers when about 25 or 30 yards off.

R. Starcat.—Three years' experience as hunter; shoots at a sleeping seal when about 15 yards from it, and never at a travelling seal when more than 50 yards away.

W. Cacu.—Two years' experience—one as boat-steerer, and one as hunter; shoots at a sleeping seal when from 10 to 20 yards from it, and at a traveller never when it is more than 40 yards away.

F. Campbell.—Three years a boat-puller and boat-steerer, and two years a hunter; shoots at sleeping seals when 10 to 15 yards from them, and at travellers never when more than 50 to 60 yards from them.

J. Brown.—Six years' experience; one as hunter; shoots at sleeping seals when 15 or 20 yards from them, and at travelling seals never when more than 40 yards away.

W. De Witt.—Four years' experience as hunter; uses both shot-gun and rifle. He shoots at sleeping seals at from 10 to 15 yards range, and at "travellers" at from 30 to 40 yards. "I seldom use a rifle, and then only at travellers. Most of the seals I lost by sinking were 'travellers' shot at long range."

W. G. Goudie.—Five years a seal-hunter; shoots "sleepers" at from 10 to 20 yards' range, and "travellers" at from 20 to 100 yards.

J. H. Hooke.—Three years a hunter; shoots at a sleeping seal when 12 or 15 yards from it, and says the average distance at which hunters shoot at "travellers" is about 35 yards.

G. F. French.—Three years' experience as hunter; shoots sleeping seals when 10 or 12 yards from them; "travellers" he shoots at 30 to 60 yards range.

O. Scarf.—A hunter of six years' experience says: "I use the rifle a great deal. I shoot 'sleepers' with the gun at 10 or 20 yards' range, and travelling seals with the rifle at as long range as 100 yards. The seals I have lost are principally in this way."

F. W. Strong.—Four years' experience; uses only a shot-gun, and shoots "sleepers" from 10 to 20 yards, and "travellers" from 25 to 75 yards' range. Fully 80 per cent. of all the seals got by him were "sleepers."

W. Shields.—Seven years' experience as a hunter: shoots at a sleeping seal when about 15 yards from it, and at a travelling seal when not more than 60 yards away, that is, with a shot-gun. Nearly every one prefers a shot-gun to a rifle, but a good shot will do as well with a rifle. "I always if would trust as much to a rifle as a shot-gun, because when a bullet hits a seal it is sure to kill it, and we seldom fail to get the seal."

C. A. Williams.—Five years' experience; shoots at a seal when from 40 to 55 yards from it.

J. Hall.—Two years' experience; shoots "sleepers" from 12 to 14 yards' range, and "travellers" from 25 to 40 yards' range.

W. Fewings.—Six years' experience; shoots sleeping seals at from 10 to 15 yards' range, according to the state of the water. "I shoot travelling seals at from 40 to 60 yards. About one-third of the seals I get are 'travellers,' and most of those lost are of this class."

T. H. Brown.—One year a boat-steerer and four a hunter. Shoots at a sleeping seal when about 15 yards from it, and most of the seals he gets are "sleepers."

N. Morrison.—Four years a hunter. Shoots sleeping seals at ranges of from 10 to 30 yards, and "travellers" all the way from 40 to 100 yards. Most of the seals I lose are "travellers."

J. Christian.—Two years' experience as hunter. Shoots at sleeping seals when 15 to 20 yards from them, and at "travellers" and breaching seals when 20 to 50 yards away. About two-thirds—perhaps more—of the seals I got were shot sleeping.

M. McGrath.—One year's experience. Shoots at seals when 20 to 30 yards from them. Seldom, if ever, more than 30 yards away, but at sleeping seals at much shorter range.

W. Heay.—Six years' experience as boat-puller and hunter. Shoots at sleeping seals at from 15 to 20 yards' range, and "travellers" from 25 to 50 yards' range. "Over two-thirds of the seals I got were 'sleepers.'"

J. J. Beckingham.—Two years a boat-steerer, says: "The hunters I have been out with shoot at seals when 15 or 20 yards from them, and there is not time for a seal to sink before the boat reaches it."

H. B. Jones.—Five years' experience. Generally shoots at seals when from 15 to 35 yards from them.

W. Hermann.—25 to 30 yards.

Captain G. Scott.—Hunts with a rifle and a shot-gun. "With a rifle I would shoot up to 150 yards, and with a shot-gun up to 30."

G. Wester shoots seals with a shot-gun when 50 to 100 yards away, and with a shot-gun 25 to 30 yards.

C. Hartiwen shoots at seals with a shot-gun at from 10 to 30 yards range, and with a rifle at from 30 to 100.

M. Scott says: "Seals are nearly all shot with a gun, and are mostly all taken at from 10 to 30 yards."

Captain J. S. Worth says: "The range at which I would take nearly all my seals is between 10 and 30 yards."

C. Francis shoots at sleepers at from 10 to 20 yards' range, and "travellers" at from 25 to 40 yards.

J. Coburn shoots at sleeping seals at from 10 to 20 yards' range, and travellers at from 25 to 50 yards.

Captain C. E. Mockler says: "The range for a gun is from 10 to 50 yards, and most of the seals are got between these ranges. With a rifle the range would be anywhere up to 100 yards."

L. J. Thiers says: "Nearly all the seals are killed with a gun, and at a distance of from 10 to 30 yards."

W. O. Shafter uses the shot-gun and the rifle. "Most of the seals are got between 10 and 40 yards with the shot-gun."

W. F. Upson says that most of the seals shot are under 15 yards away.

F. Crocker says seals are for the most part shot with a shot-gun at from 10 to 30 yards' range.

W. Conners says: "Seals are mostly shot from 20 to 30 yards' distant with a shot-gun."

P. E. Peterson gets his seals at from 8 to 30 yards' range.

H. John Lund shoots most of his seals when 15 to 18 yards' distant.

J. Ford says: "Most seals are killed from 10 to 30 yards' [range]."

J. W. Crew says that the seals he gets are mostly at a range of from 10 to 30 yards.

A. McGrew says he shoots at a sleeping seal when 15 to 25 yards from it, and would not shoot at a "traveller" when 90 yards away.

T. Garner says: "Shot will not kill a seal if it strikes it in the body when more than 40 yards away. I shoot at a sleeping seal when from 14 to 18 yards from it. Very few rifles are now used.

Captain J. Gaudin.—20 or 30 feet.

Captain S. W. Beckmann.—40 or 50 feet.

E. Hoyt.—10 to 30 feet at a sleeping seal.

Captain C. F. Dolton.—Shoots at sleeping seals when about 12 yards away, and at travelling seals all the way up to 75 or 100 yards, if a rifle is used; even at that distance the seal is generally got.

A. Sinclair.—Shoots at sleeping seals when 12 or 15 yards away.

W. Edwards.—Shoots at sleeping seals when 10 to 12 yards from them; travelling seals when as far as 60 yards from them.

M. Edwards.—Sleeping seals when about 15 yards away; travelling seals seldom more than 50 or 60 yards away.

G. F. French.—Shoots at a sleeping seal when within 25 feet of it, but would not shoot at a lively seal when more than 50 yards away.

W. M. Christian.—Shoots at a sleeping seal when 15 or 20 yards away, and at a "traveller" when 60 or 70 yards away.

P. Jolibis.—Shoots at sleeping seals when from 4 to 20 feet from them, if there is but little sea on. When the seal is awake and lively, he shoots when 30 or 40 yards away.

T. O'Leary.—Shoots at a sleeping seal when from 6 to 10 yards from it, and would not shoot at a travelling seal when more than 50 yards from it.

Captain H. F. Seward says: "Most of the seals got are 'sleepers,' and are shot at when from 15 to 25 yards from them."

P. Carlson.—Kills seals from 10 to 40 yards, and the average is about 15 yards.

D. A. Lewis says: "I shoot seals at an average distance of 25 yards, and have killed a seal and got him at 75 yards."

P. Hammel says: "Seals are killed with a shot-gun 10 to 30 yards away."

(*b.*)—*That from 80 to 90 per cent. of the Seals killed at Sea are Females, and that of these at least 75 per cent. are either pregnant or nursing.*

In respect to this contention, it is not denied that a considerable proportion of the seals taken at sea are females, and that some of these are with young; but it is affirmed that the statement, as above formulated, is very greatly exaggerated. It is also submitted, that the killing of females, within proper limits as to number, is not in itself more reprehensible in the case of fur-seals than of other animals, whether polygamous or not, and whether wild or domestic, with reference to which it is systematically practised when the females yield skins or other products of value.

British Commissioners' Report, paras. 78, 633.

Exaggerated statements are made in the United States' Case as to number of female seals killed at sea

The British Commissioners devoted special attention to this subject, and have ascertained that the pelagic sealers themselves favour such regulations as would prevent any unnecessary waste of seal life; and it will be found, on consulting their Report, that in the scheme of regulations which is formulated by them as the most appropriate, special care is taken to provide against the possible killing of gravid females.

Pelagic sealers favour Regulations such as to minimize this.

Ibid., paras. 633, 648.

Ibid., paras. 155–161.

It must be observed that the statements respecting the number of female seals included in the pelagic catch, whether those contained in the Case of the United States and its Appendices, or those made in the Report of the British Commissioners, relate to recent years only, during which attention has been particularly called to the seal fishery in consequence of complaints regarding the dearth of killable male seals on the breeding-islands. It has been established by evidence derived from the official Reports of the United States, that for some years past every male seal capable of yielding a merchantable skin which landed upon the Pribyloff Islands has been killed if it could be taken; and that the necessary consequence of the decrease in the number of male seals is the existence of a preponderant number of female seals.

The excess of females in late years the direct result of killing on Pribyloff Islands.

On this point the British Commissioners write:—

"It must not be forgotten, however, in examining these statements, that the complementary information derived from the breeding islands shows that the persistent killing of young males has led of late years to the existence of a very large surplus of females, and that, therefore, the pro-

Ibid., para. 635.

portion of females to the whole number of seals, whether at sea or ashore, is, at the present time, according to the information obtained by us, quite abnormal."

Males have increased at sea since killing on Pribyloff Islands has been reduced.

Following the limitation of the excessive slaughter of young males upon the Pribyloff Islands in 1891 and 1892, and in exact correspondence with the statement made above, many of the hunters note a decided increase of males at sea in 1892, while a marked increase in the same class upon the islands was observed by Mr. Macoun.

Appendix, vol. i, p. 151.
British Commissioners' Report, paras. 122, 156.

It thus follows that, unless the taking of fur-seals upon the high seas is in itself entirely illegal, which is wholly denied, the men so employed have, in comity and reason, fair ground of complaint as against the methods practised upon the breeding-islands, which have resulted in so seriously depleting the male element of the seal tribes, and in sapping the foundations of the continued prosperity of seal life upon which their industry depends for its existence. The methods heretofore practised upon the Pribyloff Islands have in fact assumed that the owners of these islands were the only persons interested in the fur-seal industry.

Ibid., para. 91.

The fact that, as a consequence of the restricted number of young males killed on the Pribyloff Islands in 1890, and the still smaller number killed under the operation of the *modus vivendi* of 1891, the condition of the rookeries there showed distinct improvement in 1891 and 1892, is alone sufficient to show that it has been the killing upon the islands rather than that at sea which induced the decrease. The number of seals taken at sea in 1890 and 1891 was actually greater than ever before. If, therefore, in accordance with the contention now held by the United States, the chief want upon the islands was in females, while a vast majority of the seals killed at sea were of this sex, the condition of the rookeries should have continued rapidly to deteriorate. The beneficial effect resulting from the sparing of males upon the islands is therefore specially to be noted.

Appendix, vol. i, p. 151.

Consequent improvement of conditions on Pribyloff Islands, with continued pelagic catch, shows that previous deterioration due to killing on breeding-islands.

Extraordinary character of claim now made by United States.

It is therefore wholly unreasonable and inadmissible for those interested in the islands, having themselves brought about the depletion of one class of seals, to demand for their sole benefit the suppression of another form of sealing, which, in consequence of such action, has

of late, and from the necessities of the case, resulted in the taking of a considerable proportion of females from the existing surplus of that sex.

Chief basis of allegations on this point in United States' Case, essentially inconclusive.

The assertion in the United States' Case as to the proportion of females in the pelagic catch, rests chiefly on the evidence of furriers, who have examined the skins in the condition in which they reach them, that is to say, without the heads or extremities, and stretched out of their original form. While it is no doubt quite possible for these gentlemen to correctly distinguish as to sex a certain proportion of the larger skins, from the colour of the fur and other indications, yet there is so large a number of skins, more particularly skins of seals under 3 years, which present absolutely no distinctive characters in this respect, that the estimates of furriers cannot be regarded as trustworthy. It is further to be remarked that, in the course of their business, furriers have never had to consider the question of sex at all, which in no way enters into their calculations. They do not buy or sell by sex, and it is never mentioned in trade catalogues, so that therefore their retrospective statements are not based upon any trade classifications, but are merely surmises.

Appendix, p. 257.

With reference to the question of the number of gravid females comprised in the North-west Catch, attention is called to the Table prepared by Messrs. P. R. Poland and Son, the well-known London fur merchants, in which they analyze the sizes of the whole North-west Catch from the year 1873 to the present time. From this Table, it will be seen that about 42 per cent. of the North-west Catch, after deducting therefrom all outside skins such as the Japanese skins taken on the Asiatic coast, are skins of animals too young to be bearing-females, and the balance (58 per cent.) which, so far as size goes, might be those of bearing-females. It is admitted in the United States' Case that 15 per cent. of the entire catch consists of males. This reduces the proportion of gravid females to less than 50 per cent. Further, to arrive at a fair estimate of the proportion which could be actually gravid when killed, this percentage amount must be reduced by one-half, because at least one-half of the North-west Catch is taken in the fall, long after all the females have given birth to their pups, thus making the highest possible total of gravid females in the North-west

Number of females in pelagic catch which could possibly be gravid shown to be small.

Catch to be about 25 per cent., without making any allowance for barren females.

The above calculations show, without a doubt, the correctness of the figures put forward by the United States' Case. If the more moderate, and, it is submitted, more accurate, figures given by British witnesses are taken as a basis, the percentage of females which could possibly be gravid is reduced to an insignificant number.

The British Commissioners, after carefully considering all the circumstances respecting the killing of seals at sea, write as follows:—

British Commissioners' Report, para. 651.

"The general conclusion to be derived from an examination of the statements above noted is, that in proportion to the number of skins obtained, that part of the pelagic catch made in the early part of the season, and to the south of the Aleutian Islands, is the most damaging to seal life as a whole, while the skins taken after this date whether without or within Behring Sea are obtained at much less proportionate cost of seal life."

Summary of evidence as to proportion of males and females in pelagic catch.

In the Report of the British Commissioners much evidence is quoted as to the composition of the catch at sea in respect to proportion of females, &c. This evidence may be summarized as follows:—

Captain W. O'Leary.—South of Behring Sea half cows, of which two-thirds with young. In Behring Sea, cows with young not 1 in 100.

Mr. G. Howe.—South of Behring Sea one-third of catch cows with young, or capable of bearing. In Behring Sea not 4 cows with young in a season's catch.

Mr. A. J. Bertram.—Out of 230 seal, 25 or 30 cows with young south of Behring Sea, and in Behring Sea 6 or 7.

Mr. C. J. Killen.—Proportion of females always less than that of males.

Captain W. Petit.—In 1886, off Barclay Sound, took 104 seals, of which only 3 were females. In 1887, on [illegible] Island, out of [illegible] day 2 [illegible], which 2 were females. In 1891 catch was 75 per cent. males. Of 765 seals killed, 18 were females with young.

Captain W. E. Baker.—Proportion of his catch in 1891, 3 males to 1 female.

Captain C. N. Cross.—In 1890, 90 per cent. of his catch males. In 1891, of 848 seals taken south of Behring Sea, 75 per cent. were males, 15 per cent. females with young.

Captain A. Bisset.—More males than females taken. In 1891, 70 to 80 per cent. of his catch males.

Captain T. Magnesen.—In February to April about equally divided as to sex. Near Behring Sea about 80 males taken to 1 female. In 1891 [illegible] half his catch

[illegible] 12 to 15 per cent. bearing females the best barren.

Mr. H. Co[illegible].—Of the seals killed 80 per cent. males.

Mr. R. Thompson.—Of the seals taken, 70 to 80 per cent. were males.

Mr. A. Laing.—South of Behring Sea, 3 in 5 males. In Behring Sea, 4 in 5 males.

Captain H. Cox.—Females are most abundant in February to April. About 65 or 70 per cent. of seals taken were [illegible]; 15 per cent. of the females barren. Of 2,434 seals taken in Behring Sea 5 per cent. were females with milk.

Captain C. Hackett.—In 1890, about one-fourth of his catch females; in 1891, about one-half; of 1,555 seals taken in Behring Sea between the middle and end of July only ten were females with young.

Captain C. McDougall.—Of 1,100 seals taken in Behring Sea, 800 were males.

Captain A. Douglas.—Has found one or two females with young in Behring Sea in a season.

Captain S. S. McLean.—Finds more males than females south of Behring Sea; in Behring Sea about equally divided. In 1891 his catch consisted of two-thirds males, one-third females.

Captain Dod.—Took 600 seals in Behring Sea, of which less than 20 were with young. In 1890, of 2,000 seals taken by schooner "Viva" in Behring Sea, only 2 were females with young.

Much additional evidence on the same point, including experience in 1892, is contained in the statements of sealers printed in the Appendix, and of this the following synopsis may be given:—

Appendix, vol. ii pp. 14–22.

Mr. J. Tawesopt.—Has sealed on the coast and in Behring Sea about as many females as males.

Mr. C. L. Hine.—In 1892, took more females than males on the [American] coast, and on the Asiatic side about equal number of each sex. More than half the females on the coast were with young. On the Asiatic side from one-quarter to one-half were in milk.

Captain A. Douglas.—Formerly more females were taken than males, but last two years more males, from 2 to 4 years old.

Mr. G. Roberts.—Three out of five seals taken in 1892 were males. About one-half the females taken were in pup.

Mr. J. Ryan.—Took in 1892 about as many females as males. On the Asiatic side more males than females. In 1891, in Behring Sea (American side), more males than females.

Captain R. O. Lovender.—On coast in 1892 over one-third his catch were females. Less than half of these barren. The same in other years. In three seasons in Behring Sea he found near the islands mostly females, but further out mostly males.

T. Mathasen.—Boat-steerer in 1891; thinks that out of 5 seals taken 3 are females.

J. S. Fanning.—In 1892 took 158 seals, of which 8

were females. Other hunters in same vessel had similar experience.

A. Billard.—About one-half of coast catch females, of which about one-fourth were in pup.

G. Dishow.—In 1892 took more males than ever before. In previous years a very little more than half were females. In Behring Sea about half his catch were females.

Mr. O. Buckholz.—On the American coast has taken more females than males.

Mr. R. Starrat.—Thinks there are more females than males among the seals taken.

Captain W. O'Leary.—Catches have always been composed of about equal numbers of males and females, both on the coast and in Behring Sea.

F. Campbell.—Took 65 seals in 1892, among which were more females than males; 20 to 25 were barren females.

J. Brown.—In 1892 got more females than males.

Captain A. R. Bissel.—In 1891, 80 per cent. of catch were young males. In 1892, about half females on coast.

H. R. Smith.—On Vancouver Island coast early in season about half the seals taken are females, half of which are in pup. As the season grows fewer females are got, and fewer of these in pup.

W. De Witt.—A little more than half the seals taken on the coast are females, and of these about one-half are in pup.

W. G. Goudie.—In 1892, of 2,040 seals taken on the coast about 1,500 were bulls from 2 to 4 years old. About one-half the seals taken in Behring Sea are females.

Captain L. McLean.—Outside very many more males than females are taken. Not nearly so many females as males in Behring Sea.

J. H. Hoake.—The greater portion of the catch of "Walter A. Earle" were males.

J. Shields.—Of the larger seals there are more females than males. Of the smaller seals, more males than females. In Behring Sea more males than females.

G. F. French.—Males and females in about equal numbers on the coast.

O. Scarf.—Males and females in about equal numbers both on coast and in Behring Sea.

F. W. Strong.—Thinks that about two-thirds his catch on the coast were females, one-half in pup.

A. Mathison.—More than half the seals taken on coast were females. Mostly young females and barren cows. About one-quarter females in pup.

W. Shields.—Before 1892 thinks he took a few more females than males, but in 1892 more than two-thirds of his catch were males, and this was the experience of the other hunters on the "E. B. Marvin."

C. A. Williams.—Sexes about equally divided in 1892. In 1889 and 1891 nearly all bulls. On the Asiatic side seals about equally divided as to sex.

C. Locke.—Got in 1892 a few more males than females

on the coast, but both there and on the Asiatic side there were about equal numbers of each sex.

E. Ramlose.—Before 1892 killed more females than males. In 1892 more males than ever before.

Captain E. Lorenz.—On the 11th August, 1890, in Behring Sea, his hunters got 130 seals, of which about 100 were males. Thinks he took more females than males in 1891.

Captain T. Magnesen.—Of over 1,000 seals taken on coast each year by his hunters two-thirds were males. More females than males in Behring Sea. Sexes about equal on Asiatic side.

Captain W. E. Baker.—In last two years about 25 per cent. of coast catch were cows.

I. O'Leinn.—Of 76 seals taken on coast in 1891, not more than 25 were females; and of 210 in 1892, not more than 40 were females. Mostly bulls on Asiatic side in 1891 and 1892. Not more than 6 in 100 were females.

Captain R. E. McKiel.—Gets more females than males. In 1892 more males, in proportion, than ever before.

Captain E. P. Miner.—40 per cent. of seals taken on coast, and about 60 per cent. of those taken in Behring Sea, are females.

Captain C. Campbell.—Principal part of catch in 1891 and 1892 were young males.

Captain G. Macdonald.—As a rule, more females than males are caught on coast. In Behring Sea about equal numbers of each sex.

W. Fewings.—About the same number of males and females.

D. Laing.—Thinks more females than males are taken on the coast, but that in Behring Sea—both sides— more males are taken.

T. H. Brown.—Has always taken more males than females on the coast, and about the same number of each sex in Behring Sea.

J. Morris.—More males than females.

N. Morrison.—In 1886 about two-thirds his catch were bulls. In 1891 about half were females, and in 1892 about one-third. On Asiatic side in 1891 and 1892 about half were females.

H. S. Browne.—More males than females in 1892, and more in proportion than other years.

Captain V. Jacobson.—About 3 out of 5 seals taken on the coast and in Behring Sea are females.

Captain J. W. Todd.—Remembers no year in which he took more females than males on the coast. In Behring Sea rather more than half females.

J. Christian.—Rather more than half females on Asiatic side, and about equal numbers of males and females on the American coast.

M. McGrath.—More than half, both on American and Asiatic sides, were females.

W. Heay.—Two-thirds of catch young males.

J. Beckingham.—As many females taken as males.

Captain H. B. Jones.—Thinks vessels he has been on took more females than males both in Behring Sea and on the coast.

Captain E. Cantillion.—Until 1892 catch contained more females than males. In 1892 many more males than females.

C. Peters.—More females than males in 1891 and 1892.

H. Paxton.—In Behring Sea in 1891 took 330 seals. Most of these were young bulls. In 1892, 139 seals on coast; about 20 females among them.

G. Heater.—In 1890, in Behring Sea, greater part of catch males; in 1891, on coast, majority were young bulls; in 1892, one-third cows.

A. McGarva.—In 1890 more females than males; in 1891 about equal numbers of each sex; in 1892 more males than females.

R. Findlay.—More males than females in 1892; more females in previous years.

J. Krapt.—About half the seals taken by him females.

F. Warrington.—More females than males killed.

G. E. Miner.—As a rule more females than males, but in 1892 but 10 per cent. of catch were females.

Captain J. D. Warren.—A little over half the catch females both on the coast and in Behring Sea.

C. O. Burns.—In 1891 about half females; in 1892 nearly all bulls.

M. Pickney.—In 1891 less than half females; in 1892 very few females on coast. Of 420 taken in Behring Sea about one-fourth were females.

W. O. Hughes.—In 1891, both on coast and in Behring Sea, about half females; in 1892 not more than 10 per cent. females on coast.

J. McRae.—About half females.

J. Brown.—About half of each sex.

J. Siteman.—In 1888 and 1889 about half females; in 1890 nearly all males; in 1892 three-fifths males. In Behring Sea each year about half the catch were females.

W. Hermann.—More females than males as a rule.

G. Scott.—On the coast and in Behring Sea about half males and half females.

G. Wester.—About 60 per cent. females on the coast; in Behring Sea about half.

C. Lutjens.—About four-fifths of catch females.

C. Hartiven.—About 60 per cent. females both on the coast and in Behring Sea.

M. Scott.—In Behring Sea about half of each sex; on the coast for last two years more males than females.

J. S. Worth.—On the coast in 1890 and 1891 70 per cent. females; in 1892 about half and half. In Behring Sea the majority taken were bulls.

C. Francis.—Both on the coast and in Behring Sea about half females.

M. Keefe.—In 1889 and 1890 many more males than females; in 1891, in Behring Sea, nearly half females. Never has taken more females than males. In 1892 nearly all young males.

J. Osburn.—In 1892 nearly all males; in previous years less than half females.

J. Figuera.—Pretty well divided as to sex on coast. Never got females in Behring Sea.

C. E. Muckler.—As a rule more cows than bulls.

L. J. Thiers.—Early in season more females than males; later on more males.

G. Wells.—In 1890, on coast, more than half males; in 1891 about half females. In Behring Sea, in 1890 and 1891, about two-thirds of catch females. In 1892 four-fifths of catch males.

W. O. Shafter.—Both on the coast and in Behring Sea more females than males.

A. F. Carlson. More females than males on the coast.

F. Crocker.—More females than males on the coast; in Behring Sea about half and half.

W. Conners.—More than half females on the coast.

P. E. Peterson.—On the coast about half males and half females.

H. J. Lund.—About 65 per cent. of coast catch females.

J. Ford.—On the coast more males than females.

J. W. Crow.—60 to 70 per cent. females.

W. Roland.—On the coast about one-third females; in Behring Sea about half females.

A. W. Roland.—In 1891 about half females; in 1892 about one-third females.

J. Matthews.—About half of coast catch females; in Behring Sea at least 5 out of 6 were males.

A. McKeil.—3 out of 5 taken on coast females.

G. C. Grow.—Two-thirds of catch on coast and in Behring Sea females.

J. Gaudin.—Chiefly females in Behring Sea, but nearly all were dry.

C. Blomquist.—14 or 15 females among 149 taken in 1892.

B. Hope.—Thinks more females than males are taken.

W. Petit.—Not more than 130 females out of 660 seals in 1892.

C. P. Dillon.—About three-fifths of catch females in 1892.

A. Sabich.—About half males, a few more than half perhaps.

W. Edwards.—About as many males as females.

M. Edwards.—About half of each sex.

G. F. French.—Between one-third and one-half females.

P. Jolibis.—About the same number of each sex on the coast; more females than males in Behring Sea. In 1892 many more males than females on coast.

T. O'Leary.—More females than males.

F. Morean.—80 per cent. females.

P. Carlson.—Half of each sex on the coast.

P. Hansel.—20 per cent. more females than males.

J. Carthed.—About 60 per cent. females.

Indian Evidence.—Composition of Catch.

Hit-lith. More females than males off San Juan.

Kosada.—6 out of 10 females off San Juan. In Behring Sea always more males than females.

Schoultwick, Clawannuel, Sooy-ah, Thompson, Jack, Tootooch, and *Jimmy*.—Off south end of Vancouver Island more females than males; further north more males than females.

Chahapisona, Howeisum, and *Chahonto*.—Along Vancouver Island coast more females than males; further north more males.

Wa[illegible] Wa[illegible].—Along Vancouver Island coast about half the catch—perhaps a little more—females.

Chihto.—Along the Vancouver Island coast as many females as males.

Ope[illegible].—Five or six years ago more males than females; now as many females as males.

Kock-kach-ch.—Five or six years ago took more males than females, but now about the same number of each sex is taken.

Sho-wish.—Generally about the same number of each sex; this year more males.

Chet-la-koi and *Kickinao*.—About half of each sex.

Chickkahoto, Keshaqua, and *Chetchit*.—Along the coast got about 4 males out of every 7 seals killed on the coast; in Behring Sea more males than females are taken.

Chet-[illegible], Wa[illegible], Nahsow, Chapigabay, Tawassay, and *Tootooch*.—Along the coast more males than females are taken, and those of them who have been in Behring Sea had the same experience there.

Ehachosut.—Along the coast about the same number of each sex is taken.

Anautz-achet and *Louis Anautz-achet*.—Sometimes more females than males are taken on the coast, but in 1892 more males.

Hot-la-cuath.—About the same number of males as females.

Cedar-kanim and *Ah-hoppa*.—As many males as females along the coast.

Atla and *Ahachpook*.—Off Vancouver Island coast more cows, but further north more bulls.

Quonah.—Along the coast more females than males, but further north and in Behring Sea more males than females.

High-at-lick-shed.—Some years more bulls, some years more cows.

Charlie Quista, Sa-ah-sum, and *Wah-tin*.—About half cows and half bulls.

J[illegible] [illegible], and *Johnny Hammond*.—More males than females [illegible].

Scob.—66 seals; nearly all males.

Charlie.—More males than females.

Gus.—95 seals; not many females.

D[illegible]—73 seals; only 1 female.

Joe.—41 seals; not many females.

Taylor.—88 seals; more males than females.

Tommie.—59 seals; more males than females.

(c.)—That, in consequence of the killing of nursing Females at Sea, dead Pups have been found in increasing Numbers on the Pribyloff Rookeries every year since Pelagic Sealing began in Behring Sea, and that such Pups died from Starvation.

This contention wholly novel.

It remains to deal with the third of the main contentions above cited. This assertion is, like several other assertions to which great importance is now attached in the Case of the United States, entirely new.

It is therefore somewhat remarkable to find, notwithstanding the apparently complete absence of comparable observations in the reports on the islands in previous years, that it is now maintained, not only that such results have been concurrent with the progress of pelagic sealing, but that they have been observed to increase *pari passu* with the growth of such sealing at sea. In previous reports on the islands, where the death of "pups" has received mention at all, it has been apparently uniformly attributed to one of two causes, *i.e.*, either to overrunning of the young by adult seals, or destruction of the young by surf during storms.

For references to United States' official documents, see British Commissioners' Report, paras. 328–333.

The mortality noticed in 1891 was, moreover, attributed to the same causes by such of the officials and natives on the Pribyloff Islands as were first addressed on the subject by the British Commissioners, showing very plainly that up to that time no other explanation had been present to their minds.

The mortality of young seals in 1891, first noticed by British Commissioners.

Ibid., para. 346.

In presenting the evidence upon which dependence is placed in this matter in the Case of the United States, Dr. W. H. Dall, who visited the Pribyloff Islands in 1880, Captain Bryant, who was on the islands from 1870 to 1877, Mr. Moulton, who was on St. George Island from 1877 to 1881, Mr. Otis, on the islands from 1879 to 1881, and Mr. Gliddon, Government Agent from 1882 to 1885, are first cited, to prove that dead pups were very seldom or scarcely ever seen upon the islands up to the year 1884.

Evidence cited by United States to show that dead "pups" seldom seen on Pribyloff Islands till 1884.

But Mr. H. W. Elliott, writing in 1875, and as the result of his experience gained in 1872-74, speaks of the normal presence of—

But this is contradicted by previous Reports of United States' Government.

"decaying carcasses of old seals and the *many pups* which have been killed accidentally by the old bulls while fighting with and charging back and forth against one another."

"Report on the Condition of Affairs in Alaska," p. 149.

Lieutenant W. Maynard, United States' navy, writing of the islands in 1874, says:—

44th Cong., 1st Sess., H. R., Ex. Doc. 43, p. 4.

"*Many of them* [the pups] are killed by the surf, particularly if the season is a stormy one, as they are not strong enough swimmers to save themselves from being dashed against the rocks by it."

"Monograph of North American Pinnipeds," pp. 397, 398.

Bull. Mus. Comp. Zool., vol. ii, No. 1, p. 97.

Still again in 1876, Captain Bryant notes the destruction of a large number of pups in the autumn by a storm, a destruction so great in fact that he anticipated its effect would appear in 1880; and the same authority further refers to the destruction of young seals which always results from a stampede of the older animals.

Captain Bryant further alludes to another cause of death of young seals as follows:—

"Monograph of North American Pinnipeds," p. 408.

"When the sun shines for two or three hours, and the rocks become heated, there are occasional deaths among the beach-masters and very young pups from sunstroke, the symptoms being a nervous jerking of the limbs, followed by convulsions and death. Fortunately these occurrences are rare, and it was only in 1874 that any appreciable number were lost from this cause. That year [illegible] young seals died about the 1st August."

United States' Census Report, p. 38.

Again in his Monograph, submitted in 1880, Elliott refers to the destruction of large numbers of pups by October gales.

British Commissioners' Report, para. 328.

The British Commissioners were likewise informed by Mr. D. Webster, who has been for many years on the Pribyloff Islands, that in one year "in the seventies" he had seen the beaches at north-east point of St. Paul Island "strung with dead pups."

It is clear, therefore, that the statements of witnesses especially quoted by the United States' Case, who speak from past recollection only, are not in accordance with facts.

Destruction of "pups" due to raids.

Raids made upon the breeding rookeries may also be cited as a cause of death of young seals, and that such raids have been frequent is elsewhere shown. In respect to the destructive effect of raids upon the young seals, one of the witnesses cited by the United States may be quoted. Mr. I. M. Lenard says:—

United States' Case, Appendix, vol. ii, p. 217.

"When on a raid we would watch for a favourable opportunity to make a landing, and then kill male and female fur-seals indiscriminately. Probably for every 500 marketable skins secured, double that number of pups were destroyed."

Evidence cited by the United States to show progressive increase of death of "pups" with development of pelagic sealing, wholly retrospective.

From the year 1884 onward, it is maintained in the Case of the United States that the number of dead pups became considerable, and increased annually; but three witnesses only are specially cited in support of this contention, Messrs. Morgan, Loud, and Hereford. Nothing on this matter seems to be found in the annual reports of the Government officials on the islands in these years, though it must be admitted to have been important to the interests which these agents were there to guard. The affidavits of these gentlemen, speaking to the precise numbers of dead pups in a long series of years, and making out that these tally exactly with the numbers of females taken by the pelagic hunters, are all dated in April 1892.

United States' Case, pp. 213, 214

Mr. Morgan's evidence is, however, very imperfectly quoted in the United States' Case. He says:—

The quotations of evidence relied on are moreover imperfect

"For instance, during the period of my residence on St. George Island [beginning in 1874], down to the year 1884, there were always a number of dead pups, the number of which I cannot give exactly, as it varied from year to year, and was dependent upon accidents or the destructiveness of storms. . . . . But from the year 1884 down to the period when I left St. George Island [in 1887] there was a marked increase in the number of dead pup seals, amounting, perhaps, to a trebling of the numbers observed in former years, so that I would estimate the number of dead pups in the year 1887 at about 5,000 or 7,000 as a maximum."

Ibid., Appendix, vol. ii, p. 64.

He then proceeds to argue that the increased number of dead pups resulted from pelagic sealing.

Mr. Loud was on the islands each year from 1885 to 1889. He speaks of seeing dead pups in all these years, and believes the mortality to have occurred in consequence of pelagic sealing.

Ibid., p. 39.

Dr. Hereford has been stationed on the islands at various times from 1880 to 1891. He says:—

"The loss of life of pup seals on the rookeries up to 1884 or 1885 was comparatively slight, and was generally attributed to the death of the mother seal from natural causes (or from their natural enemies in the water, or, as sometimes happened, sudden storms with heavy surfs rolling in from certain directions on the breeding rookeries, but never at any time would a sufficient number of pups be killed to make it a subject of special comment, either among the natives or the employés of the Company). Coincident with the increase of hunting seals in the sea, there was an increase in the death-rate of pup seals on the rookeries," &c.

Ibid., p. 32.

United States' Case, p 214.

The portion of this statement here placed in parentheses is omitted from the citation as given in the Case of the United States.

But contention held does not accord with the date of sealing in Behring Sea.

If, then, the recollection of these three gentlemen of circumstances which passed unrecorded at the time of their occurrence, both by themselves and all other officials on the islands in these years, be accepted as substantially in accordance with the facts, we find that an increasing number of dead pups occurred each year since about 1884. In the Case of the United States, it is claimed that this took place concurrently with increased sealing in Behring Sea and in consequence of the death of suckling female seals. But in 1884 only one Canadian sealing-schooner is known to have entered Behring Sea, and in 1885 but two schooners, and it was not till 1886 that as many as sixteen vessels entered the sea, and the number of seals taken there became large.

British Commissioners' Report, paras. 67, 588, 589, 590.

If correct, the contention shows that the observed deaths resulted from acts on the Pribyloff Islands.

There is, therefore, important absence of correspondence between the date above fixed for the first excessive death of pups as asserted, and that at which the operations of sealers in Behring Sea can possibly be supposed to have exercised any perceptible effect. It will be found, on the other hand, on turning to the chapters of this Counter-Case dealing with the management of the islands themselves, that, following the expansion of the area of driving initiated in 1879, the operations of the Company in the efforts to secure their "quota" of skins were pressing with annually increasing severity on the seals there throughout these very years; and it may well be asked whether just such results might not naturally be expected to follow from such excessive and repeated driving of the seals.

Ibid., paras. 684, 685, &c., and para 714.

The fundamental assumptions of the contention held by the United States are not proven.

It must be borne in mind that the possible connection between the death of young seals on shore and the supposed killing of their mothers at sea, necessarily depends upon several circumstances which have not hitherto been adequately investigated.

It is not known that breeding females go to sea for food while the young are dependent on them.

It is, for instance, not known that the mother seals actually go to sea for food during all that part of the early life of the pup in which it is

absolutely dependent on the mother. But if this be assumed, it has, further, not been shown that at this season the nursing females go to such a distance from the shores as to be taken in any considerable numbers by sea-sealers—always excluding the illegitimate killing by raiders close along the rookery fronts. Some further reference will be made to these disputed points; but, in the first place, the actual circumstances bearing on the death of young seals in 1891, in connection with which the claim now made by the United States arose, may be shortly noted.

Actual circumstances of the mortality of "pups" in 1891.

Particular attention was given to this subject by the British Commissioners during their visits to the Pribyloff Islands in July, August, and September 1891; for though, as above stated, it had escaped the notice of those in charge of the islands till their attention was directed to it, it appeared to the Commissioners to be a matter of importance. The result of their investigation is given at some length in their Report, which must be consulted for details. In summing up the facts, they write:—

British Commissioners' Report, paras. 83, 344–346.

> The death of so many young seals on the islands in 1891 was wholly exceptional and unprecedented, and it occurred in the very season during which, in accordance with the *modus vivendi*, every effort was being made to drive all pelagic sealers from Behring Sea. Those familiar with the islands were evidently puzzled and surprised when their attention was first drawn to it, and were for some time in doubt as to what cause it might be attributed. . . . .
>
> "The mortality was at first entirely local, and though later a certain number of dead pups were found on various rookeries examined, nothing of a character comparable with that on Tolstoi rookery was discovered."

Ibid., para. 355.

Shown to be incompatible with the theory advanced in the United States' Case.

The Commissioners then show, by reference to dates in detail, that the excessive mortality, when first observed, had occurred at a time too early in the summer to be explained by the killing of mothers at sea; and point out that, although further deaths of young occurred at later dates, there appeared every reason to believe that the whole resulted from some one cause, which had extended from the original localities, and had become more general.

The Commissioners do not regard the available evidence as sufficient to enable them definitely to determine the cause of the mortality in 1891, but suggest the following as among probable causes:—

Ibid., para. 356.

(*a.*) Disturbance connected with the collection of "drives," in which nursing females were included, which animals, though eventually spared, did not succeed in rejoining their young.

(*b.*) Disease of an epidemic character.

(*c.*) Stampedes and over-running of the young.

(*d.*) Raids upon the rookeries specially affected.

British Commissioners' Report, paras. 346 *et seq.*

The circumstance that the mortality observed in 1891 was confined to St. Paul Island, and was not found on the neighbouring Island of St. George, is in itself sufficient to indicate that it cannot be attributed to the killing of seals at sea. All the witnesses cited in the United States' Case in respect to the mortality in this year speak of its occurrence on St. Paul Island only.

Recurrence of mortality in 1892, when practically no seals were killed in Behring Sea, proves absolutely that the killing of females at sea cannot be accountable.

Absolute confirmation of the view that the death of pups in 1891, cannot be attributed to the killing of mothers at sea, has been obtained from the experience of the year 1892. There is complete information as to the number of vessels engaged in pelagic sealing in Behring Sea during the season of 1892. The statements of sealers set out in the Appendix, the statement of Captain Parr, the Senior British Naval Officer, detailed to patrol Behring Sea, and the careful watch kept by the United States' ships "Mohican," "Yorktown," "Adams," "Ranger," "Rush," and "Corwin," and Her Majesty's ships "Melpomene" and "Daphne," established that not more than 500 seals were killed in Behring Sea during 1892. Therefore, no exceptional mortality among pups could have arisen from the killing of nursing females. It is, however, undoubted that more dead pups were seen on the islands in 1892 than in 1891. It was, further, again noticed that the excessive mortality was as before confined to St. Paul Island. Attention to Mr. Macoun's Report on this matter is respectfully invited.

Appendix, vol. i, p. 146.

Character of evidence adduced by the United States to show that nursing females go far to sea for food.

United States' Case, pp. 115–119.
Ibid., p. 209.

A considerable body of evidence is cited in the Case of the United States, to support the statement that the nursing females regularly and frequently go long distances to sea in search of food; and in recurring to this evidence on another page, it is so mentioned as to convey the impression that the females leave the rookeries for this purpose almost immediately after the birth of the young, or, in other words, almost immediately

after their arrival there; though all previous observations, together with many of the statements now cited in the United States' Case itself, show that the females do not seek the water for any purpose till some time after giving birth.

British Commissioners' Report, para. 306. Elliott's Census Report, p. 39, &c.

The United States' Commissioners and Professor Allen adduce no facts.

The United States' Commissioners in their Report content themselves with making the following affirmation on this subject:—

"Cows when nursing regularly travel long distances to feed. They are frequently found 100 or 150 miles from the islands, and sometimes at greater distances."

United States' Case, p. 329.

Professor J. A. Allen, in his specially prepared Report, merely says:—

"It is further *well known* that the mother seals leave the islands at frequent intervals and proceed far out to sea in search of food," and "in Bering Sea they [the female seals] make long excursions for food."

Ibid., Appendix, vol. i, pp. 409, 410.

The affidavits are subsequent in date to the Report of United States' Commissioners.

Neither the United States' Commissioners nor Professor Allen have referred to the facts upon which they have reached these conclusions. The whole of the affidavits specially referred to in the Case of the United States on this subject, except two, bear dates subsequent to that at which the Report of the United States' Commissioners was completed, viz., 15th April, 1892; and of these two exceptional affidavits, one, that of Dr. H. H. McIntyre, speaks only of young (non-bearing) females going to feed. Professor Allen has not cited the facts which have led him to assume a new position, though in his former writings he is found to be fully committed to the statement that the female seals do not feed during the season in which they resort to the breeding-islands.

The abstinence from food of pinnipeds at the breeding season is generally recognized.

The habit of prolonged abstinence at the breeding season is well known to be normal among the *Pinnipedia* as a whole; and notwithstanding the number of years over which the habits of seals have been observed, there is no record of food being found in the stomachs of females when killed upon the islands, or any facts that justify the statement that nursing females leave the islands on feeding excursions.

Professor Allen on this subject.

Writing particularly of the eared-seals (or fur-seals and sea-lions), Professor Allen says:—

"One of the most striking features in their history is that at this period [that of reproduction], *both sexes* pass weeks, and even months, without food, or without often

Bull. Mus. Comp. Zool., vol. ii, No. 1, p. 37.

visiting the water. Arriving at the breeding-grounds exceedingly fat and unwieldy, they seem to be sustained by the fat of their bodies, they finally leave at the end of the breeding season greatly emaciated.

"A similar fact has been long known in respect to the walrus, whose period of fasting, however, seems to be shorter than that of the eared-seals."

In his Monograph of 1880, Professor Allen writes on the same subject:—

"Monograph of North American Pinnipeds," p. 227.

"The males, during the breeding season, remain wholly on land, and they will suffer death rather than leave their chosen spot. They thus sustain, for a period of several weeks, an uninterrupted fast. They arrive at the breeding stations fat and vigorous, and leave them weak and emaciated, having been nourished through their long period of fasting wholly by the fat of their own bodies. The females remain uninterruptedly on land for a much shorter period, but for a considerable time after their arrival do not leave the harems."

Captain Bryant.

Referring particularly to the North Pacific fur-seal, Captain Bryant, who is responsible for that part of Professor Allen's work on the eared-seals which treats of the habits of this animal, notes the result of his careful investigation of the statement made by the natives, that the seals do not eat while resorting to the islands. He refers particularly to the males, but adds:—

Bull. Mus. Comp. Zool., vol. ii, No. 1, pp. 101, 102.

"The same was true of the few nursing females killed for dissection."

He further draws particular attention to the absence of all excrement upon the rookery grounds.

Further statements by Professor Allen and Captain Bryant.

Professor Allen himself, in an explanatory note to the passages just referred to, in confirmation of Bryant's statement, writes thus:—

"Steller states that, in the numerous specimens he dissected he always found the stomachs empty, and remarks that they take no food during the several weeks they remain on land. Mr. Dall confirms the same statement in respect to the present species, and Captains Cook, Weddell, and others, who have had opportunities for observing the different southern species, affirm the same fact in regard to the latter. Lord Shuldham long since stated that the walrus had the same habit, though its annual fast seems somewhat shorter than those of the eared-seals.

* * * *

"This singular phenomenon of a protracted annual fast during the period of parturition and the nursing of the young—the season when most mammals require the most

ample sustenance — seems not wholly confined to the walruses and eared-seals. So far as known, however, it is limited to the pinnipeds; and, excepting in the case of a single member, the sea-elephant (*Macrorhinus elephantinus*), to the two above-named families. By some of the old writers the sea-elephant was said to feed sparingly, at this time, on the grasses and sea-weeds that grew in the vicinity of its breeding-places, but the weight of the evidence in respect to this point seems to indicate that this species fasts similarly to the eared-seals and walruses, during the period it resorts to the land to bring forth its young.

* * * *

"It may be that other species of the earless seals undergo similar fasts, but if so, I have as yet seen no record of the fact."

Captain Bryant, in his contribution on the habits of the fur-seal, which is incorporated in Professor Allen's later-dated Monograph, does not repeat the observations recorded in his former treatise, but refers to them, and, in regard to the particular subject now in question, clearly shows that he maintained the same position as before. Writing, for instance, of the female fur-seal as follows :—

"From that time [*i.e.*, that of impregnation] she lies either sleeping near her young or spends her time floating or playing in the water near the shore, returning occasionally to suckle her pup.

* * * *

"The females, after giving birth to their young, temporarily repair again to the water, and are thus never all on shore at once, so that by the end of the season there will be twice as many young seals on shore as females."

"Monograph of North American Pinnipeds," p. 386.

Conclusions of the British Commissioners on the subject.

The British Commissioners, as the result of their investigation of this subject, sum up their conclusions in these words :—

"It appears to be certain that the mature males doing duty on the breeding rookeries do not feed at all during the breeding season, and that for some time, at least several weeks, after landing, the breeding females do not leave the rookery-grounds in search of food. There is no apparent reason why the 'holluschickie,' or young males, should not go to sea in quest of fish. Singularly enough, however, though animals of this class have been killed by hundreds of thousands upon the breeding islands under all conceivable conditions of weather, and often within less than an hour of their deportation from their hauling-grounds, the almost universal testimony is to the effect that their stomachs are invariably found to be free from food."

British Commissioners' Report, para. 232.

British Commissioners' Report, para. 233–235.

Observations made by them.

The Commissioners then detail such observations as they were themselves able to make, including the examination of the stomachs of 108 young males (Pribyloff Island), one old male, and two females (Behring Island). The old male and the females, last mentioned, were driven up directly from the rookery but 200 yards distant, and at once killed, but no trace of food was found in the stomachs.

Absence of all excrement on the breeding-places.

The complete absence of excrement on the rookeries, already referred to in a quotation from Captain Bryant, was specially noted by the British Commissioners, who say:—

Ibid., para. 243.

"It is to the absence of such matter alone that the continuous herding together on one spot for some months of so many thousand animals is on sanitary grounds rendered possible. It became obvious that so soon as the seals commence again to feed, it must be absolutely necessary for them to abandon their crowded quarters on shore. The evidence this afforded, that the females do not feed to any notable extent till the young are practically weaned, or, at all events, until very late in the suckling season, is perhaps more definite than that given in any other way."

They add:—

Ibid., para. 308.

"It appears to us to be quite probable, however, that toward the close of the season of suckling, the female seals may actually begin to spend a considerable portion of their time at sea in search of food."

Analogy of the hair-seal.

In the case of the hair-seal, experienced sealers point out that there is no excrement whatever on the ice resorted to by hood-seals and floe-rats, both of which species abstain altogether from feeding whilst on the ice; but that the ice to which the harp-seal resorts is covered with dung, and the harp-seal is known to feed throughout the season.

Ibid., paras. 307, 308, 649.

If females go to sea for food, this does not happen till the autumn.

It will thus be noted that, while presenting the available evidence on the subject, the British Commissioners did not feel themselves to be warranted in making a perfectly definite statement on it either in one sense or in the other. They, however, state their belief that if the females feed while suckling, it cannot be till towards the close of the breeding season, and probably not to any notable extent till after the middle of September, at which date pelagic sealing in Behring Sea becomes practically impossible, because of boisterous weather.

Evidence collected by British Commissioners.

The British Commissioners endeavoured to obtain and compare as impartially as possible

the statements of all those who had any familiarity with seal life, as to the actual distances to which seals supposed to be engaged in feeding might go from the breeding islands. They found, in the first place, that the natives generally, both of the Pribyloff and Commander Islands, believed that the female seals did not feed at all till the young had been weaned; while other authorities stated very varied distances for the length of supposed feeding excursions, taking for granted in many cases that the mere presence of seals at sea during the breeding season, showed that the animals so seen had come away from the breeding-islands in search of food. All available opinions up to the date at which their Report was written are included in it, and serve to show the actual information at that time.

British Commissioners' Report, para. 307.

Ibid., paras. 309–312.

The British Commissioners then explain the result of their own observations in 1891, which show that the seals are always to be found in considerable numbers close along the rookery fronts, while comparatively few seals are seen as much as half-a-mile from the rookeries, and that at a distance of, say, 4 miles to seaward of these places, it would be difficult for any observer to say by appearances at sea alone where a rookery-ground existed. They then write to the following effect:—

Breeding seals do not go far from the rookeries for any purpose.

"It is, however, certain, from statements obtained, that females in milk are occasionally killed at sea by pelagic sealers, and though it is possible that there are females which have deserted the islands in consequence of having been driven up to the killing-grounds with the hollus-chickie, or because of some other cause of disturbance, such as the death of their young, it is highly probable that in the later summer and autumn the distance to which the females go from the breeding-place becomes gradually increased. It is, nevertheless, scarcely credible that, under any circumstances, the females engaged in feeding their young can navigate to great distances from the islands on erratic courses, and subsequently return punctually and without fail to their rookeries; and any assumption made on this basis must be regarded as requiring proof of a character very different to that so far advanced by those holding such a belief."

Ibid., para. 314.

In examining the evidence on this subject which is specially relied upon and is referred to in the Case of the United States, in support of the theory that the death of young seals on the islands is due to the killing of the mothers at sea, it will be noticed that several of the witnesses

See particularly United States' Case, pp. 117, 118.

Statements in the United States' Case respecting females in milk killed at sea.

speak merely of having killed occasional seals in milk at long distances from the Pribyloff Islands, while in other cases it is taken for granted that any seals seen in Behring Sea during the breeding season must be females cruizing from the islands in search of food. Several witnesses affirm that large numbers of breeding females in milk are taken at long distances from the islands. But such females, it may well be assumed, are but strays, driven from the islands by the constant disturbances there, or which have deserted them because of the death of their young; though in the autumn it is also possible that some cows whose pups are already practically or entirely weaned, may eventually travel to considerable distances, and possibly with no intention of returning to the islands.

Females in milk taken where no connection can be assumed with Pribyloff Islands.

United States' Case, Appendix, vol. ii, pp. 321, 337, 348.

Appendix, vol. ii, pp. 49, 70, 73.

Some explanation of this kind must be found to account for the killing of a few seals in milk, late in August, in and about the passes of the Aleutian Islands, referred to by several witnesses cited by the United States. In the evidence of sealers contained in the Appendix to this Counter-Case, Messrs. W. Shields and J. Brown state that they have killed females in milk, in different years, off Kadiak Island. E. Lorenz and G. C. Errow have similarly found females in milk in several years. In none of the above cases can the females so killed be supposed to have left suckling young upon the Pribyloff Islands.

Females in milk taken after young are weaned.

Ibid., pp. 22, 23.

Further evidence to the same effect is given by other witnesses, who state that though some seals in milk were taken by them in Behring Sea, those got after the end of July showed only traces of milk; and this, in such a manner as to prove that they were running dry, either because the young had already been naturally weaned, or in consequence of the loss of their young, or abandonment of the breeding-grounds.

Fish abound near the breeding-places.

Appendix, vol. i, p. 13[illegible].

It will be remembered that the evidence is such as to show that, if any class of seals go systematically in search of food during the breeding season, this can only be the females. But from the facts obtained respecting the abundance of fish in the immediate vicinity of the breeding-islands, it appears to be certain that these are not preyed upon to any great extent by the masses of seals frequenting the shores.

The British Commissioners report that such fish as cod and halibut are taken by the natives at distances varying from 1 to 3 miles from the

rookeries on St. Paul and St. George Islands, and add that when at anchor within less than half-a-mile off the largest rookery on Behring Island, cod and other fishes were caught in abundance at a depth of 6 to 7 fathoms.

British Commissioners' Report, para. 231.

Mr. Macoun, as the result of his observations in 1892, presents further evidence in detail, such as to show that fish abound in the immediate vicinity of both the Pribyloff and Commander Islands, and adds:—

"It is thus evident that should seals, whether males or females, require food during the time they resort to the islands (which has not been proved), it is to be had in abundance close to the rookeries."

Appendix, vol. i, p. 139.

The facts above alluded to are, however, directly in contradiction of the statement found in the Case of the United States, to the effect that fish are very scarce in the waters in the vicinity of the breeding-islands. This in effect is merely an unsupported and hypothetical assumption, and it is difficult to determine whether it is the basis of the further statement as to excursions of seals to great distances to feed, or is consequent on that statement.

Though otherwise stated in United States' Case.

United States' Case, p. 116.

With the facts in evidence, it is quite unreasonable to suppose that female or other seals seeking food go to great distances in this quest, while ample supplies might be obtained by them without this effort.

There is therefore no reason to suppose that seals, if looking for food, should go to great distances.

It is submitted from the facts contained in the foregoing chapter that it is established that any abnormal death of pups on the islands is not due to pelagic sealing; and that pelagic sealing is not an illegitimate, improper, or wasteful method of killing seals.

That the contention in the United States' Case that pelagic sealing is wholly destructive of the seal property, is without foundation; and that it is a legitimate development of the original method of taking seals practised by the Indians and other inhabitants of the coasts of America.

That the allegations respecting its injurious effect upon seal life are greatly exaggerated, and that any incident connected therewith, proved to be harmful, can be effectively dealt with by a scheme of general regulations.

CHAPTER XII.

Management of the Pribyloff Islands by Russia and by the United States.

Historical outline of Management.

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 131—

"Under the general protective system adopted by Russia for seal [illegible] and the restrictions added from time to time, the seal herd continued to increase, until the Managers of the Russian-American Company resolved to [illegible] and [illegible] to take 70,000 skins from St. Paul Island without danger of depleting the seal population."

(2.) United States' Case, p. 74—

"It was the fur industry [illegible] all other considerations which decided the United States to pay the sum of 7,200,000 [illegible] paid by Russia for the cession and transfer [illegible] its and property."

(3.) United States' Case, p. 152—

"When the United States [illegible] into possession of these islands by the cession of 1867, it was impossible immediately to terminate an administrative system [illegible] parts of the territory [illegible] known and so distant from the seat of government. The year 1868 [illegible] the Pribyloff Islands."

(4.) United States' Case, p. 133—

"The following summer (1869) the Government Agent, Dr. H. H. M[illegible], in a revenue vessel, under command of Captain John A. [illegible], visited the islands, and [illegible] precautions to protect the seal herd [illegible]."

(5.) United States' Case, p. 14[illegible]—

"Various [illegible] and suggestions were made to the [illegible] the United States in relation to this matter, but [illegible] and [illegible] examination of the [illegible] proposed the most expedient was [illegible] of lands into single, [illegible] Company, [illegible] the [illegible] supervision and control of [illegible] United States' Treasury Department [illegible] purpose."

(6.) United States' Case, p. 15[illegible]—

"I do not see [illegible] possible to conduct the sealing [illegible] judgment."

(7.) United States' Case, p. 296—

"That the present existence of the herd is due wholly to the care and protection exercised by the United States and by Russia."

SUMMARY OF BRITISH REPLY.

A historical review of the management of the Pribyloff Islands by Russia, shows that till 1806 practically no care was exercised; that between 1806 and 1835 the number of seals generally diminished; that from about 1812 it

gradually increased, under an improved control; and that the rookeries were in excellent condition when Alaska was ceded to the United States in 1867.

During the years from 1820 to 1867, statistics show that the annual average number of seals killed did not exceed 45,000.

In 1868, the Russian control being withdrawn, an excessive slaughter of seals was permitted to occur, over 250,000 being killed. In 1869 and 1870, a partial but very incomplete control of the islands was established by the United States, and the number of seals killed in these years is only approximately known.

Though it was suggested by several competent authorities that the Government should assume sole control of the seal interests on the Pribyloff Islands, these interests were vested in a Commercial Company by lease in 1870.

Notwithstanding the experience gained in previous years, the number of seals permitted to be killed for skins annually on the islands was at the same time experimentally fixed at 100,000. The actual number killed exceeded this amount.

The "quota" thus established became in effect a fixed number, and was not reduced by the Government during the entire twenty years' term of lease of the Company, though repeatedly mentioned in official Reports as being too great.

The effects of this excessive killing can now be traced, in the condition of the seal rookeries, as recorded in the contemporaneous Reports of various years.

The restriction of killing on the islands to young males did not obviate the result of excessive killing; but, on the contrary, induced serious changes affecting the organization of the rookeries and vitality of the seals.

No regulations heretofore devised can render the killing of fur-seals upon their breeding-islands other than dangerous; and in the particular case of the Pribyloff Islands, the method of management has been imperfect in conception and execution.

Russian and United States' management.

This subject divides itself naturally into two periods, viz., that of the Russian control and that of the subsequent control by the United States. It is quite apparent, from an examination of the history of the islands, and particularly from the collection and discussion of the known facts set out in the Report of the British Behring Sea Commissioners, that the evils which have arisen on the islands are largely attributable to the methods of management and control there employed, which have from the first been imperfect, not only in conception, but also and to even a greater degree in execution.

The immediate interest in these methods on the breeding-islands, is obviously greatest in regard to the management by the United States, but important conclusions of fact may be deduced from a comparison of the two periods, that before and that after the cession of Alaska to the United States.

Statements in United States' Case relating to Russian management inaccurate.

United States' Case, p. 130.

In the Case of the United States, a brief statement is made respecting the management during the Russian régime, by which it is made to appear that, from the time at which the Russian-American Company was organized in 1799, an efficient control and system was adopted, under which the fur-seals resorting to the islands continuously increased throughout, and up to the date of the cession of Alaska to the United States. This contention is, however, very far from being in accord with the historical facts, which are generally well known, chiefly by means of the writings of the Russian chronicler, Veniaminov. These facts will be found in the form of a Summary in the Report of the British Behring Sea Commissioners.

British Commissioners' Report, paras. 39–41.

British Case, Appendix, vol. iii, "United States No. 2 (1891)," pp. 58–60.

It is considered to be unnecessary here to enter into any detailed criticism of the management of the Pribyloff Islands by the Russians, for which reference may be made to the authorities stated, as well as to Mr. Elliott's synopsis of the conditions contained in that part of his Report of 1890 which has been published, and which is printed in one of the Appendices to the British Case.

Outline of the Russian régime.

British Commissioners' Report, p. 788.

Ibid., para. 786. Bancroft's "Alaska," p. 417.

It is known that practically indiscriminate killing continued from the discovery of the islands in 1786 down to 1806, when the Russian Ambassador Resanof visited the islands, and learned that the seals had decreased 90 per cent. since the earlier years. He ordered the killing to stop for a time, but notwithstanding this and other precautionary measures, insufficient in themselves or imperfectly carried out, a continued decline in the number of seals took place until 1834 or 1835. From about 1842, an increase commenced, which (with possibly some brief periods of arrest or reversal) was generally maintained till the close of the Russian régime. It is further shown that the decrease depended largely upon the killing at certain times of great numbers of seals, and it is even asserted by Veniaminov that between 1801 and 1804 the Company had accumulated about 800,000 skins, many of which rotted for want of care, and were destroyed or thrown away.

In the earlier years both males and females, as well as young, were killed; but even after the killing was directed chiefly to young males, the bad effect of killing these in excessive numbers was well known. Thus Mr. Yanovsky, reporting

on his inspection of the rookeries in 1820, remarks:—

"... that every year the young bachelor seals are killed, and that only the cows, 'sekatch,' and half 'sekatch' are left to propagate the species: it follows that only the old seals are left, while, if any of the bachelors remain alive in the autumn, they are sure to be killed the next spring. The consequence is, that the number of seals obtained diminishes every year, and it is certain that the species will in time become extinct.

"This view is confirmed by experience."

Revised translation, Appendix, vol. i, p. 21.

Mr. Yanovsky then recommends that not more than 50,000 seals in all should be taken annually from the Pribyloff Islands; but the reduction in numbers of the seals which had already taken place did not permit even this number being taken in succeeding years.

Number of seals killed during Russian control comparatively moderate.

In one important respect, however, the Russian management is found to contrast very favourably with that under the United States, *i.e.*, in the comparatively small number of seals actually killed. From the year 1817 accurate data on this subject are available, and for the whole period of the Russian control a fairly exact estimate of the average annual killing may be made from various sources. After a careful examination of the data, the British Commissioners write:—

"Combining the whole period covered by the figures above quoted, and adding the year in which the islands were discovered, we find that the killing on the Pribyloff Islands averaged for this term of eighty-one years about 34,000 annually."

British Commissioners' Report, para. 39.

Reason of excessive killing in last year of Russian control.

For the years subsequent to 1816 the actual numbers are given in tabular form, from which it appears that the average numbers killed from 1817 to 1837 fall from over 50,000 to less than 20,000. After the latter year the numbers taken remained under an annual average of 20,000 until the year 1856, when the average for ten years rose to 30,000. The high figure of 75,000 was quite exceptional, and was reached only in the last year (1867) of the Russian tenure, when, according to Captain Bryant, "knowing the islands were to be surrendered to the United States, the Russians took all the seals they could." It was fortunate that at this time the Russian methods of handling the skins did not enable them to take more.

Ibid., paras. 775–779.

Quoted by Allen in "Monograph of North American Pinnipeds," p. 389.

United States' Case, p. 131.

The killing of 75,000 in the last year of the Russian tenure is, however, so referred to in the United States' Case as to appear to be a natural consequence of an increasing abundance of seals, and is apparently intended to lead up to the killing of 100,000 authorized soon after by the United States' Government.

An examination of diagram No. 5 in the Report of the British Commissioners will, however, show more distinctly than any mere reference to figures, the actual character and amount of killing during the greater part of the Russian régime.

Opinion of Russian authorities on number properly killable.

Veniaminov, the chief authority on the condition of the Pribyloff Islands during the earlier years, characterizes the killing of about 100,000 seals on the islands, which occurred previous to 1799, as "horrible killing," and that of 50,000 seals, occurring about 1820, as excessive and leading to diminution; while the Board of Management of the Russian Company, following Mr. Yanovsky's Report in 1821, express the opinion that 40,000 might safely be taken on St. Paul and 10,000 on St. George, in conjunction with a period of total rest every fifth year.

Elliott's Census Report, pp. 70, 140, 147.

Ibid., p. 147.

United States' Case, Appendix, vol. i, p. 58.

Other authorities on number killed during Russian régime.

Bryant, likewise, referring to the later years of the Russian régime before 1867, writes:—

Quoted by Allen in "Monograph of North American Pinnipeds," p. 389.

"For many years they were able to kill only a small number, but the seals gradually increased, so that they killed as many as 40,000 in one year."

Mr. W. H. Dall, who visited the islands in 1868, may also be quoted to the same effect, as follows:—

"Alaska and its Resources," p. 496.

"At first the fur-seal were killed in immense numbers by the Russians. At one time 300,000 skins were destroyed, in order that the market might not be overstocked. It was only when their numbers were very greatly diminished that the number annually killed was limited, and the other previously mentioned restrictions were imposed. Of late years not more than 50,000 fur-seal were allowed to be killed annually."

50,000 annually, considered a safe maximum number.

It is evident from the foregoing remarks that an annual killing for skins of about 50,000 seals upon the Pribyloff Islands was thought to be, as the result of experiences gained by the Russians, a safe maximum killing at times when the rookeries upon these islands were in excellent condition.

British Commissioners' Report, para 39.

As a matter of fact, it appears that, under the Russian régime, for a period of eighty-one years, from the discovery of the islands, to 1866, the average annual killing reached about 34,000 only.

Cession of Alaska to United States in 1867.

In 1867, Russian America, now known as Alaska, was ceded by Russia to the United States and the Pribyloff Islands as a part of the territory passed into the control of the United States.

Enormous slaughter resulting in 1868.

Though the Treaty of Cession was concluded as early as the 30th March, 1867, the Russian-American Company retained possession of the Pribyloff Islands throughout the summer or sealing season of that year. In the following year (1868) a number of private adventurers, chiefly from the United States, took possession of the islands and proceeded to carry out an altogether unprecedented slaughter of seals, in the entire absence of Government supervision, to the estimated number of 240,000 or 250,000 on the Island of St. Paul, and 30,000 or 35,000 on the Island of St. George.

British Commissioners' Report, para. 808. Elliott's Census Report, p. 28. "Monograph of North American Pinnipeds," pp. 390, 398. Dall's "Alaska," p. 497.

Value of Pribyloff Islands at first unknown in the United States.

It is contended in the Case of the United States that the value of the fur-seals, and especially that of the Pribyloff Islands as the breeding-places of this animal, was well known to the United States at the time of the acquisition of Alaska, and constituted a chief object in connection with the purchase of that territory. This assertion has been disproved by the facts quoted on a former page of this Counter-Case. Had such been the case, it is impossible to believe that the United States would so have neglected the protection of the breeding-islands.

United States' Case, pp. 74–77.

See p. 71.

The first effect of the "management" of the Pribyloff Islands by the United States must be conceded to have been most disastrous to seal life. The results of the extraordinary slaughter which then occurred are traced in the Report of the British Commissioners.

British Commissioners' Report, paras. 44, 809.

Partial but ineffective control established by the United States in 1869. Number of seals killed unknown.

Sixteen months after the date of the Alaska Cession, an Act was passed by the United States' Congress, which, with other provisions, rendered it unlawful to kill certain fur-bearing animals (including the fur-seal) in Alaska; and in 1869 Government control of the Pribyloff Islands to a limited extent appears to have been attempted. Agents of the United States' Government were certainly upon the islands, but the actual number of seals killed is not known, the estimates made by various officials ranging from about 42,000 to about 150,000. Mr. H. W. Elliott in his monograph gives the number killed as 87,000.

Ibid., para. 809. United States' Senate, Ex. Doc. No. 32, 41st Congress, 2nd Sess., pp. 24, 37.

United States' Census Report, p. 25.

About 500,000 seals killed in the years 1867–69.

Report to Secretary of War by General Jefferson C. Davis, August 20, 1870.

It is thus apparent that, during the three years 1867, 1868, and 1869, over 400,000 seals were killed, and it is probable that, including the 30,000 or 35,000 killed on St. George Island, with other unrecorded killings, the actual number was nearer 500,000.

British Commissioners' Report, para. 868.

No supervision was exercised as to the kind of seals killed, and though there is reason to believe that, in consequence of the previous training of the Aleuts under the Russians, these were chiefly males, it is known that at least 40,000 females were included, in the single year 1868.

Mr. H. W. Elliott writes, concerning the management of the Pribyloff Islands previous to the control of the Alaska Commercial Company:—

"Report on Conduct of Affairs in Alaska," p. 240.

"It was a disorderly medley of civil and military authority, and, so far as I can learn, [illegible] no [illegible] control on any of the officers concerned on the part of the Government."

The proposal to lease the Pribyloffs to a Company condemned.

In 1870, the United States' Government decided to lease the right of killing seals upon the Pribyloff Islands to the highest responsible bidder: an Act of Congress was passed for this purpose, and a lease was accorded to the Alaska Commercial Company for a period of twenty years. The wisdom of the step thus taken was very seriously questioned in the United States at the time.

Mr. Washburne.

"Congressional Globe," 40th Cong., 3rd Sess., p. 341.

Mr. Washburne, in the House of Representatives, on the 13th January, 1869, in a debate on a Bill to provide territorial government for Alaska, opposed section 7 on the plea that it would effect a monopoly of the seal fisheries in the interests of a few. Several Companies, he stated, were endeavouring for a "mere song" to obtain the exclusive right of carrying on these fisheries.

Mr. Fowler.

"Congressional Globe," Part II, 40th Cong., 3rd Sess., p. 1497. Sen., February 23, 1869.

When in the month of February 1869 the proposed lease to the Alaska Commercial Company was before Congress, Mr. Fowler resisted the Bill as the first of the kind ever proposed in Congress, and stigmatized it as a most bold-faced monopoly and an infamous proposition, without a solitary reason in its favour.

Mr. F. N. Wicker.

House Mis. Doc. No. 12, 41st Cong., 2nd Sess., Vol. I.

Frank N. Wicker, United States' Special Treasury Agent (16th November, 1869), recommended the passage of a Bill authorizing the Government to assume sole control of the seal fisheries of St. George and St. Paul Islands; to

[illegible] except the natives, who should be [illegible] seals at fair remuneration; and to appoint inspectors at liberal salaries to carry out restrictions imposed.

Dr. Dall.

Dall, in his work on Alaska, suggests a method of [illegible] with the management of the islands in the [illegible] of a monopoly being considered inconsistent with the spirit of the United States' institutions.

Dall's "Alaska and its Resources," p. 497.

Mr. Boutwell.

Secretary of the Treasury Boutwell in 1870 reported that the suggestion had been made to the Department in various forms that the islands should be leased to a Company. He believed the plan to be open to very grave objections, in that it created a monopoly in an industry important to the people of the United States. Such a monopoly, he stated, was opposed to the ideas of the people; while, as the expiration of the lease approached, the inducements to protect the interests involved would diminish. He could not concur in the lease. He then suggested a method of Government control.

Ex. Doc. 109, 41st Cong., 2nd Sess.

Mr. Elliott.

Professor Elliott says:—

"It will be remembered that at the time the question of leasing the islands was before Congress much opposition to the proposal was made on several grounds by two classes—one of which argued against a 'monopoly,' the other urging that the Government itself would realize more by taking the whole management of the business into its own hands."

Elliott, Census Report, p. 26.

He added, however, that as he was absent at the time of the discussion, and not knowing the arguments employed in it, he found himself, at the time of writing, of opinion that the leasing of the islands to the highest bidder was the correct mode of dealing with them.

No efficient control established in 1870, the first year of lease.

The lessees, in consequence of the late date at which they obtained their lease, did not enter into any full control of the Pribyloff Islands in 1870, and the number of seals killed in this year is again not known with certainty. The natives were allowed (as in the previous year) to kill seals not only for food, but also for the purpose of obtaining supplies by the sale of the skins. Captain Bryant, who was at the islands in this year, and General Davis, estimate that the natives thus killed 85,000 seals. An official return of seals killed of which the Government officers had actual cognizance (made up in 1871) shows a killing of 23,773, of which less than 10,000 skins in all were saved.

Bryant in "Monograph of North American Pinnipeds," pp. 391, 398.
British Commissioners' Report, para. 810.
H. R., Ex. Doc. 83, 44th Cong., 1st Sess. Elliott's Census Report, p. 70.

Facts which should have guided the United States in establishing the number of seals to be killed by the Company.

After a full examination of the data respecting the condition of the Pribyloff Islands during the Russian tenure, the British Commissioners write:—

British Commissioners' Report, para. 664.

"From the experience [illegible] it appears to be [illegible] clearly shown that in the [illegible] of years the killing of 40,000 to 50,000 [illegible] on St. Paul was [illegible], the principal seal-breeding island, [illegible] while that practiced during the later [illegible] Russian control [illegible] fell short of the figure [illegible] a corresponding increase in number of seals would [illegible]."

When therefore the Alaska Commercial Company was placed in possession of the Pribyloff Islands by the United States' Government, any examination of the Russian records would have shown it to be necessary, on the most ordinary prudential grounds, to limit the number of seals to be taken in accordance with former experience. Indeed, the extraordinary slaughter which had characterized the inception of the United States' control pointed very strongly to the necessity of restricting the killing to a very low number for several years following, and to a subsequent permission of a gradual increase, if the conditions actually existing from year to year should be found to warrant such increase.

These were not considered, but a "quota" more than double that before taken was fixed on.

Ibid., paras. 47, 809, 810, 815. United States' Senate, Ex. Doc. 32, 41st Cong., 2nd Sess., Dall's "Alaska," pp. 496, 497.

No such safe policy was pursued. The number of skins to be taken annually was, on the contrary, arbitrarily and without sufficient data, and, as it was admitted at the time, experimentally, fixed at 100,000. While it is true that the Act of Congress reserved the right to the Secretary of the Treasury of reducing the number if found necessary, no reduction was in fact attempted during the continuance of the lease of the Alaska Commercial Company, or till the year 1890, though information was not wanting in some subsequent years, as to the deleterious change which had begun and was progressing upon the rookeries.

Contrast with Russian killing.

No such number of seals had been killed in any year under the Russian control since 1806. The character of the new and unprecedented draft which thus began upon seal life is very clearly shown by diagram No. 5 in the Report of the British Commissioners.

The quota applied to marketable skins; many more seals were killed.

It is further to be noted that the number fixed by law applied to marketable skins only, while the actual number of seals killed exceeded

[illegible]

[illegible] shown by official figures to be over 7 [illegible]

British Commissioners' Joint Report, paras. 49, 50.

[illegible] of the policy initiated may be traced.

[illegible] in [illegible] of seals from the first years of the United States' control—are referred to in some detail by the British Commissioners. In reaching this effect, reliance is chiefly placed on the official Reports made from time to time to the United States' Government, but the evidence thus afforded is fully confirmed by personal inquiries and information subsequently obtained.

See particularly British Commissioners' Report, paras. 37–51, 652–702, 811–822.

While the contemporaneous official Reports are not in all respects so full and explicit as could be desired, it is submitted that they now form the best available evidence, and are for all purposes superior in authenticity to the retrospective statements which appear to be almost exclusively depended upon in the Case presented by the United States' Government, in regard to the questions here at issue.

Excessive killing mainly responsible for decrease on the islands.

It is not maintained on the part of Great Britain that the operations of pelagic sealers have been without effect on the total volume of seal life in the North Pacific; but, on the contrary, it is admitted that this has in late years, though in a minor degree, contributed to produce the general decrease in numbers which is pointed out as having occurred, in the Joint Report of the British and United States' Commissioners.

It is, however, maintained that the available evidence is amply sufficient to show that this decrease began and had already assumed a cumulative character, long before the development of pelagic sealing had reached such proportions as to render it of importance in this connection. It is

Injury to seal life on the islands soon became apparent, but the "quota" remained fixed.

further maintained that, even after the general decrease had gone so far that it could no longer be ignored upon the Pribyloff Islands, the number of seals permitted to be killed there by the United States' Government had practically become *a fixed number*, which was not reduced even to correspond with the evident requirements of the case. The imperfect and wasteful methods employed were not amended, and even the (now admittedly) useless slaughter of unweaned young seals was allowed to continue unchecked till the year 1884.

Notes indicating the decadence of the seal rookeries under United States' management.

Referring particularly to the historical aspects of this question of the management on the Pribyloff Islands by the United States, and without repeating the details or citations of authorities to be found in the Report of the British Commissioners, the following chronological notes on this subject may be given, in evidence of the continued decadence of seal life under the management of the United States:—

British Commissioners' Report, paras. 809 *et seq.*

1869.—Immediately after the excessive and irregular slaughter of 1868, seals are reported to have disappeared rapidly from the Pribyloff Islands (Bancroft, vol. xxxiii, p. 638), and coincidently seals were observed in unusual numbers on the coasts of Oregon, Washington Territory, and British Columbia.—(Bryant.)

1872.—The number of virile males not actually upon the breeding-grounds, was observed to be decreasing, while that of females was increasing.—(Bryant.)

1873.—The number of virile males was reduced to half what it had been before, while the females were still increasing, and the size of the "harems" was likewise increasing, with other grave changes in habits.—(Bryant.)

1874.—Lieutenant Maynard speaks doubtfully of the effect of killing the large legal quota of seals, which he says is "entirely experimental." He notes the small number of bulls in proportion to cows.

1875.—It was in this year first officially reported that the killing of 100,000 young males annually did not leave a sufficient number to mature in proportion to the females. The useless killing of pups was also protested against.—(Bryant.)

1876.—The decrease in fully matured males resulting from the slaughter of young males in 1868 and 1869 was in this year greatest. It was again reported that the number fixed for killing was too high.—(Bryant.)

1879.—In this year it became necessary to extend the area of "driving" to include rookeries which had not before been drawn upon, in order to obtain the quota of skins.

1880.—Colonel J. Murray dates the beginning of a steady decrease in numbers from this year.

1881.—The killing of pups for food alone, was again strongly protested against.—(Elliott.)

1882.—The required number of large skins could no longer be obtained in this year.—(McIntyre.) The same gentleman places the beginning of decrease in this year. A decrease in the number of "killables" on St. George Island was noted.—(Wardman.)

1885.—No increase in seals between 1882 or 1883 and this year.—(Moulton, Gliddon.)

1886–87.—The standard weight of skins was lowered in these years in order to allow the Company to make up its quota by killing smaller animals.

1888.—McIntyre states that the number of seals had decreased since 1882, that the rookeries did not produce enough to bear the killing of "100,000 by marauders in addition to the 100,000 killed lawfully." He again recommends that the killing of pups should be stopped, and notes that there were too few bull seals on the rookeries. He adds that the size of skins ruled still smaller than in 1883. The standard weight was actually lowered from 6 lbs. to 4½ lbs., so as to enable all seals down to 2-year-olds to be taken.

1889.—The standard weight of skins was still further lowered, for the purpose of allowing the number of 100,000 to be taken. Some 40,000 very small skins were included, many being those of yearling seals.

A scarcity of full-grown virile males in proportion to females was evidenced by the large number of barren females in 1890.—(Elliott.)

1890.—Finding that it would be impossible to secure the legal quota of male seals in this year, the Government Agent (Goff), for the first time in the history of the islands under the United States, took the responsibility of stopping the killing when only 20,995 skins had been secured. He speaks of the "indiscriminate slaughter upon the islands, regardless of the future life of the breeding rookeries," and the "unequal distribution of ages and sexes" as among the chief causes of the decline. In the same year Agent Murray states that after several meetings and full discussion the natives unanimously declared that the decrease was due to the killing of too many male seals. He affirms this belief also from his own experience. Agent Lavender registers his opinion to the same effect. Agent Nettleton coincides with Goff's conclusions. Special Agent Elliott also particularly refers to the scarcity of virile males, and adds, "that result began, it now seems clear, to set in from the beginning of twenty years ago, under the present system."

British Case, Appendix, vol. iii. "United States No. 2 (1891)," pp. 16, 17.

Ibid., p. 19.

Ibid., p. 21.

Ibid., p. 48.

Ibid., p. 57

The above notes, based as far as possible on observed facts only, serve to indicate the general tendency of affairs connected with seal life on the islands under the management of the United States, and to bear out the conclusion that the number originally fixed for killing and retained as the legal quota till the year 1890 was throughout too high, and had thus from the first been a leading cause of decrease of a cumulative nature.

Warnings as to wasteful killing disregarded.

It will be observed, that none of the above-cited protests or warnings as to the excessive number of seals killed, or even those respecting the wasteful killing of suckling pups for food, appear to have received attention from the Government, which, on the other hand, appear to have relied on such general statements of continued increase and excellent state of the breeding rookeries as were freely supplied, often in the text of the same Reports from which the above extracts are made, to a date as late as 1888.

Standard size of skins lowered to enable quota to be filled.

It will further be observed that, when the diminution in the number of seals on or about the Pribyloff Islands could no longer be denied, the complaints made by the agents and lessees were of lack of killable male seals; that the lowering of the standard weight of skins was permitted from year to year in order to allow younger and yet younger classes of males to be killed; and thus, that instead of adopting measures to check the decrease, the Government through its Agents actually facilitated the perpetuation and annual growth of the evil complained of.

Appendix, vol. ii, p. 256.

The Tables given in the Appendix to this Counter-Case, including, as they do, practically the entire number of skins obtained from the Pribyloff Islands since 1873, conclusively substantiate the remarks above made, and prove the gradual decadence in the condition of the rookeries from that date, by showing that the average size of the skins obtained has been in the main steadily diminishing.

In order to fully explain the nature and effects of the management of the Pribyloff Islands under the United States' régime, some of the points above alluded to must, however, be considered in greater detail.

The excessive killing changed the natural condition of the rookeries

It is, in the first place, quite apparent, that the natural conditions of seal life were, from the very beginning of commercial killing by man, interfered with, and that the balance established by

nature being thus disturbed, various concurrent changes affecting seal life necessarily followed. It is further seen, from the historical notes which are available, that such disturbance becomes more and more serious and far-reaching in its effects, in correspondence with the yearly increasing extent of interference with the natural conditions. If the killing of the fur-seals while on land had been regulated that a proportionate number of males and females were taken, leaving unaffected the natural ratio between the sexes, the which number would doubtless have been reduced, but the favorable conditions of nature would not have been otherwise affected. When, however, the killing was directed solely to one sex, the occurrence of very grave changes became inevitable. The British Commissioners write:—

British Commissioners' Report, para. 35.

Changes aggravated by the restriction of killing to males.

"Such changes are not prevented by the restriction of killing to males, for an excess in number of males is part of the natural conditions: and any change in the proportion of males, even if not pushed so far as to become in itself a cause of decrease in numbers born, constitutes a true cause of change in habits, and has a very good effect on the time and place of landing of the females . . . . An excess in number of males will, the consequent competition for females, more in not probability, further be regarded as a provision for maintaining the strength of the race as a whole by means of natural selection, and in the case of the fur-seal it is not possible to substitute for such provision the artificial selection of breeding males as is done with animals under the control of man."

Ibid., para. 46.

This interfered with natural process of selection of breeding males.

The particular point last alluded to in the above extract is also very well taken by Count Tommaso Salvadori, who, in his reply to a "Circular Letter" by Dr. C. H. Merriam, elsewhere referred to, writes:—

"But, at the same time, I think that the yearly killing of about 100,000 young males on the Pribilof Islands must have some influence on the diminution of the herd, especially preventing the natural or sexual selection of stronger males, which would follow, if the young males were not killed in such a great number."

United States' Case, Appendix, vol. i, p. 423.

Further, it must be borne in mind that, though large numbers of seals not actually engaged in breeding resort to the breeding islands, the true reason of the coming to land of the fur-seals for a certain portion of each year, is the necessity imposed on the females so to do for the purpose of giving birth to their young. It is at this particular season that most will

animals are by civilized peoples granted a period of respite from disturbance and slaughter, and though in this instance it has been exceptionally held, as a theory, that the non-breeding young males can be secured and killed without disturbing the actually breeding seals, this is not in fact the case.

Isolation and quiet are the ruling cause of the resort of the seals to these particular islands. This is sufficiently plain from an examination of the circumstances in the North Pacific, and it is unnecessary to go further afield in search of climatic or physical conditions of a peculiar kind. The known facts respecting seal rookeries in other parts of the world may, however, be referred to as affording confirmatory evidence to the same effect.

Any disturbance on the islands deleterious and unnatural.

The British Commissioners write as follows on this subject :—

British Commissioners' Report, para. 76.

"It is thus clear that the slaughter of seals upon the breeding islands is in itself an essentially critical and dangerous method of killing, which, though established by long custom, cannot be otherwise justified. No regulations which have heretofore been devised have, even theoretically removed such dangers."

Ibid., par. 55.

The fact that the Pribyloff Islands are now permanently inhabited by man, apart from the more specific disturbance of the breeding-places which results from the methods of taking the seals, must in itself be regarded as an anomaly. The smoke and movement incident to habitation of the islands, and the odour of the many thousand putrid carcasses upon the various killing-grounds, must have a disturbing effect upon the seals.

It remains to be noted, in connection with the question of the management of the Pribyloff Islands, that expressions to be found in the writings of various authors, referring in terms of approval to the methods of management, are based, probably in every instance, on the statements contained in the earlier works of Mr. H. W. Elliott. Through these alone has any general account of the Pribyloff Islands obtained wide publicity. Mr. Elliott has, in fact, been accepted as the chief authority on seal life in the North Pacific. Commendatory expressions of the kind above alluded to are cited in the Case of the United States, but Mr. Elliott's works are no longer referred to on any point, nor has his latest

Report, resulting from his special investigations on the Pribyloff Islands in 1890, been published by the United States. Such portions of this Report as the author has himself made public show that he has found reason to change his former opinions as to the propriety of the methods employed on the islands.

CHAPTER XIII.

Management of the Pribyloff Islands by Russia and by the United States (continued).

Excessive killing of Male Seals.

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 153—

"The number of seals annually killed annually by the [illegible] was, from 1871 to 1891 inclusive, 100,000, but [illegible] was [illegible], and entirely within the control of the Treasury Department of the United States. In 1891, Congress [illegible] Commission [illegible] on the islands, [illegible] the department [illegible] necessary to reduce the quota of skins to be taken in 1892."

(2.) United States' Case, p. 154—

"The killing of a [illegible] male seals is undoubtedly [illegible] the herd, as it is with other domestic and [illegible] animals. For it has always been [illegible] the [illegible] of the present day. The [illegible] also demonstrate [illegible] their report, which [illegible] that a large portion of the [illegible] killed without [illegible]."

(3.) United States' Case, p. 172—

"[illegible] to the fact that [illegible] the seals [illegible] to the islands."

(4.) United States' Case, p. 75—

"[illegible]"

SUMMARY OF RUSSIAN REPLY.

The [illegible] the reduction in [illegible] Islands, the scarcity of [illegible] excessive [illegible] of male seals.

The [illegible] scarcity [illegible] chiefly in respect to [illegible] virile [illegible] of the [illegible] of the [illegible] Islands.

The [illegible] quoted to support the [illegible] case directly [illegible] by [illegible] Russian Reply [illegible]

Mr. H. W. Elliott, who had investigated the facts of seal life on the islands in 1872–74, was in 1890 sent to renew his investigations, in pursuance of a special Act of Congress. The Report made by him on his return was not published by the United States; but in portions of this Report published by himself, and in other published accounts of his inquiries, he strongly condemns the management of the islands, laying stress on the insufficient number of virile male seals there.

Captain Bryant, Government Agent on the Pribyloff Islands from 1869 to 1877, in Reports published in 1875, 1876, and 1880, specially adverts to the decrease of males and the undue increase of females, and states that the killing of 100,000 young males is too great.

The statements of several other Agents of the United States' Government upon the Pribyloff Islands, referring to 1881, 1882, and 1886, bear out the observations of Captain Bryant; and Mr. W. Palmer and Dr. W. H. Dall, both officials in the service of the United States, speak of a similar lack of male seals in 1890 and 1891. The British Commissioners likewise comment on the excessive number of females, as compared with males, upon the breeding rookeries in 1891.

Evidence confirming the scarcity of virile males is further afforded by the large proportion of barren or unimpregnated females found among seals killed at sea. This is attested by many witnesses, and it is further shown that this symptom of decrease of virile males has been increasing in late years.

The facts adduced are such as to prove that the contention now held in the Case of the United States as to the relative scarcity of females is unfounded.

Contentions held in the United States Case and on the part of Great Britain.

In the Case of the United States, it is thus maintained that the manner of taking seals upon the Pribyloff Islands cannot be improved upon, and that— United States' Case, p. 155.

"the killing of a proportion of the surplus male life is undoubtedly as beneficial to the herd, as it is with other domestic [illegible] and [illegible] animals." Ibid., p. 154.

It is further argued, at considerable length, that there has at no time been an insufficiency of males to serve the females on the breeding islands, and therefore that a paucity of virile males cannot be accepted as a cause of decrease in the whole number of seals. Ibid., p. 172 et seq.

On the part of Great Britain, and as the result of the investigations of the British Commissioners and other evidence, it is contended, not that a paucity of males or any other single circumstance is accountable for the whole reduction in number of the seals, but that the dearth of males has constituted one of the principal causes of such decrease; and that, in conjunction with other matters connected with the management of the islands, it is accountable in large part for that decrease.

The evidence already referred to shows how early in the history of the control of the islands,

and how repeatedly in subsequent years, the scarcity of males was noted; and further, that it was so noted and observed, not only in respect to the so-called "killable" males, but also in respect to the full-grown adult males or "bulls" on the actual breeding rookeries. It may further be added that, throughout the official Reports on the islands, no reference has been found to a disproportionately small number of females in any year.

United States' Case, pp. 172 *et seq.*

Statement in United States' Case that scarcity on islands has been in females is wholly novel.

In the Case now presented by the United States, entirely new ground is taken, and a novel contention affirming a scarcity of females is endeavoured to be supported on the strength of certain affidavits very recently obtained, while the published records dealing with the islands are entirely ignored.

Little evidence is cited in support of the statement, and is in most cases disproved by previous statements of witnesses.

The evidence actually quoted in the United States' Case in support of this new position is exceedingly slight. It consists, in fact, of certain statements made by Colonel J. Murray, Major Williams, Mr. J. C. Redpath, and Mr. J. Stanley Brown, with that of two natives. But the two natives alone directly affirm any scarcity of females, the other witnesses confining themselves to remarks as to the abundance of males.

An examination of the contemporaneous Reports made by some of the deponents themselves afford the answer to their present retrospective statements.

Mr. J. C. Redpath, an agent of the present lessees of the islands, is in this part of the United States' Case first cited, to the following effect :—

United States' Case, p. 172.

"A dearth of bulls on the breeding rookeries was a pet theory of one or two transient visitors, but it only needed a thorough investigation of the rookeries to convince the most sceptical that there were plenty of bulls and to spare, and that hardly a cow could be found on the rookeries without a pup at her side."

Colonel Murray in 1892.

No comparative statement of an earlier date by the same gentleman is in this case known; but it is submitted that extracts to the contrary effect given below cannot be described as those of "transient visitors."

Colonel J. Murray, Assistant Government Agent on the islands in 1890 and 1891, is quoted in the United States' Case as saying:—

Ibid., p. 173.

"I saw nearly every cow with a pup by her side and hundreds of vigorous bulls without any cows."

In his official Report for 1890, however, the same gentleman wrote:— Colonel Murray in 1890.

"The meeting [of natives of St. George Island] was adjourned from time to time until they had thoroughly discussed the most important questions raised, and at the last meeting, held on the 23rd May, they unanimously declared that it was their firm belief and honest opinion that the seals had diminished and would diminish from year to year because all the male seals had been slaughtered without allowing any to grow to maturity for use on the breeding-ground. I made a note of the suggestion in the journal that day, and I am now fully convinced by personal observation that it is only too true, and that the natives were correct in every particular. In 1889 the full quota of 15,000 skins was obtained here, but I know now (what I did not understand then) that in order to fill the quota they lowered the standard towards the close of the season and killed hundreds of yearling seals, and took a greater number of small skins than ever before."

British Case, Appendix, vol. iii, "United States No. 2 (1891)," p. 19. United States' Senate, 51st Cong., 2nd Sess., Ex. Doc. 49, p. 8.

Natives in 1890.

The above may be referred to also in reply to the two statements of natives quoted in the United States' Case.

Natives in 1892.

United States' Case, pp. 172, 173.

Mr. C. J. Goff, Government Agent on the Pribyloff Islands, and to whom Mr. Murray's Report last cited is addressed, is quoted as testifying— Mr. Goff in 1892.

"that, although the lessees had much difficulty in procuring their quota in 1889, a sufficient number of males were reserved for breeding purposes."

Ibid., p. 173.

In the affidavit upon which this statement is based, the following passage is, however, found:—

"I have no doubt, that I reported, that the taking of 100,000 skins in 1889 affected the male life on the islands, and cut into the reserve of male seals necessary to preserve annually for breeding purposes in the future, but this fact did not become evident until it was too late t repair the fault that year."

United States' Case, Appendix, vol. ii, p. 112.

Mr. Goff's Report of 1889, to which he here refers, though not published by the United States' Government, has been produced in reply to a Notice given in conformity with the Treaty of Arbitration. In this Report he writes:— Mr. Goff in 1889

"The prosperity of these world-renowned rookeries is fast fading away *under the present annual catch allowed by law*, and this indiscreet slaughter now being waged in these waters will only hasten the end of the fur-seals of the Pribyloff Islands."

Ibid., Appendix, vol. i, p. 85.

His Report of 1890 was protested against by the North American Commercial Company, and Mr. Goff in 1890.

See his letter, "New York Herald," May 2, 1891

he was removed from office, as he believed, in consequence of this protest. In his Report for 1890, he concurs generally in Mr. Elliott's views (quoted below), and writes as follows: –

British Case, Appendix, vol. iii. "United States No. 2 (1891)," pp. 16, 17. United States', Senate, 51st Cong., 2nd Sess., Ex. Doc. 49, p. 5.

"It is evident that the many preying evils upon seal life—the killing of the seals in the Pacific Ocean along the Aleutian Islands, and as they come through the passes to the Behring Sea, by the pirates [*sic*] in these waters, and the [illegible] *regardless of the future life of the breeding rookeries*, have at last with their combined destructive power reduced these rookeries to their present impoverished condition, and to such an unequal distribution of ages and sexes that it is but a question of a few years, unless immediately attended to, before the seal family of the Pribyloy group of islands will be a thing of the past. Notwithstanding the fact that the seals were looked upon as inexhaustible, and were officially reported to be increasing as late as 1888, the time has suddenly come when experiment and imagination must cease, and the truth be told."

United States' Case, p. 173.

Major W. H. Williams, Government Agent on the islands in 1891, is the only other witness specially cited by the United States in support of the existence of a sufficient number of males. He had not previously visited the islands, and his Report for the year in question has not been published.

United States' Case, pp. 352-355

Ingenious and elaborate diagrams accompanying the Report of the United States' Commissioners, are intended to demonstrate in what way a large proportion of young male seals may be annually killed without detriment to the general reproductive powers of the fur-seals collectively. These diagrams may be accepted as an elaboration and explanation of the theory in accordance with which the killing of seals upon the Pribyloff Islands has heretofore progressed, but are very far from proving the expediency of such killing. They are based entirely on assumed data, for it is not possible, as in the case of domestic animals, to obtain any facts respecting many of even the more important points connected with the history of the fur-seal. Not only are the data respecting the life history of the fur-seal thus assumed, but the prepotent effects of natural causes, climatic and other, are necessarily omitted from consideration in the calculations presented.

The fundamental assumption of the intricate computations upon which these diagrams are

based is found to be that, in consequence of the polygamous habit of the fur-seal, a large proportion of females may be killed each year without detriment if only the females be spared. The fallacy of this proposition as applied to wild animals, in respect to which the selection of breeding males by man is not possible, has already been pointed out. If, in effect, any selection is practised in killing upon the islands, it is the finest males which are chosen for killing, thus broadly reversing the operations of nature.

United States' Case, p. 183

But this is only the first of numerous succeeding assumptions upon which the whole calculation is built up, every one of which must materially alter the result arrived at; and, in consequence of the uncertainty attaching to all of them, the diagrams presented cannot be considered as possessing any practical value.

It is stated that—

"[illegible] Table of Mortality for males [illegible] approximately the [illegible] age, and [illegible] for the diminution of their [illegible]."

Ib. p. 352.

This, however, does not deter the computer from assuming the normal life at twenty years, from assuming that one-half the young born, die within the first year after birth, or from assuming an "approximate" death rate for the already assumed further years of normal life of the seal. It is then still further assumed that the number of males and females born is equal; and though this particular assumption appears to be a probable one from analogy with other animals, no satisfactory evidence is forthcoming in the case in question.

The number of years during which the female may remain fertile, or the male may retain his virility, are likewise quite unknown. Experience gained in the case of sheep, and that also resulting from the keeping of deer in parks and under observation, shows that, though polygamous, the males of these animals are unable to maintain their virility unimpaired (in consequence of the demands made upon it) for more than a few seasons, after which their propagating power falls off very rapidly. If, therefore, the same rule holds in the case of the fur-seal (and the analogy is very close, particularly in respect to the deer), the number of males actually required would be

very materially increased. The time of fertility of the male, in such cases, is, in other words, much shorter than that of the female.

It must not be omitted to note, in the case of the fur-seal, that the age of puberty of the female is attained at least three years before that of effective service by the male, thus rendering the risk of previous death much greater in males than in females. As the death-rate from such causes is admittedly unknown, the results in regard to the number of males reaching a virile age in proportion to births must likewise be wholly uncertain.

Whether the age of effective service by the males has in nature become gradually increased in consequence of the polygamous habits of seals upon the rookeries, and the impossibility of any but the larger and older males holding places on the rookeries, or whether the later date of fertility in the case of the male, resulting in greater losses of males, and acting on an equal birth-rate in respect to sexes,—has led to such polygamous habits, it is impossible to determine.

In any case, tables or diagrams founded on such a train of assumptions as those above noted, cannot be accepted as proving anything to the point in connection with seal life, though they serve, as above stated, to show in what manner the methods practised in the breeding-islands have been justified.

Veniaminov, during the Russian control of the islands, spent much ingenuity and doubtless much time in elaborating very similar tables, but no reference appears to have been made to these when it was decided to fix the number of seals for killing at 100,000 annually under the control of the United States.

The available data are too uncertain for any theoretical discussion such as that attempted by the United States' Commissioners. An appeal must be made rather to facts and results, and these, it is maintained, show in the clearest possible manner that the reduction in number of seals met with on the Pribyloff Islands is chiefly due to the number of seals killed upon these islands, and to the manner of killing there practised.

Further evidence of decrease of male seals.

In order to show still more clearly, however, the untenable character of the claim which is now made in the United States' Case, to the effect that the observed decrease on the islands has been primarily in females, the following

additional extracts from Reports of Government officers upon the islands may be referred to.

Mr. A. W. Lavender.

In 1890, Assistant Agent A. W. Lavender writes:—

"The writer was surprised when he first visited the rookeries to find *no young bull seals upon* them; this looked strange to him, and he began to look up the cause, and it occurred to him that the constant driving of young male seals and the killing of all the 2-, 3-, 4-, and 5-year-olds, that *there were no young bulls left to go on the rookeries*, and without young blood the fur-seal industry will be something of the past in a very few years."

British Case, Appendix, vol. iii. "United States No. 2 (1891)," p. 21. United States' Senate, 51st Cong., 2nd Sess., Ex. Doc. 49, p. 9.

Mr H. W. Elliott's unpublished Report.

It has already been noted that Mr. H. W. Elliott, whose investigations and writings on the fur-seal of the North Pacific are so well known, was sent to the Pribyloff Islands in 1890 for the special purpose of again inquiring into the conditions of the seal interests there. This was done in pursuance of a special Act of Congress approved the 5th April, 1890. Though the United States' Government have, unfortunately, not made public the Report of these investigations, some portion of Mr. Elliott's Report, which has been communicated by the author to the press, is available. In the part of his Report so published, Mr. Elliott writes as follows, after pointing out the meaning of the extension of "driving" to the more distant rookeries in 1879:—

"But when in 1882 it became absolutely necessary to draw from that time on until the end of the present season, heavily and repeatedly, upon the hitherto untouched sources of supply for the rookeries, in order to get the customary annual quota—at that time that fact, that glaring change from the prosperous and healthy precedent and record of 1870-81, should have been—it was ample warning of danger ahead; it seems, however, to have been entirely ignored—to have fallen upon inattentive or incapable minds; for not until the Report for 1889 from the Agent of the Government in charge, who went up in the spring of that year for his first season of service and experience—not until his Report came down to the Treasury Department has there been the slightest intimation in the annual declarations of the officers of the Government of the least diminution or decrease of seal life on these islands since my work of 1874 was finished and given to the world."

British Case, Appendix, vol. iii "United States No. 2 (1891)," pp. 56-61.

He then proceeds to specify the nature and causes of the decrease, and writes:—

"Had, however, a check been as slowly and steadily applied to that 'driving' as it progressed in 1879-82 upon those great reserves of Zapadnie, South-west Point, and

[illegible]

Mr. Goff.

Referring again to Goff's Report of 1889, and to the effect therein attributed to pelagic sealing, he continues :—

"I was prepared to find by the [illegible] that the breeding-grounds had lost heavily, but that did not even then satisfy me as to his statement, which [illegible] suddenly in 1889, that little more than half the established annual quota of 100,000 holluschickie [young bachelor seals] suitable for killing could or would be secured here in 1890; for great as my estimated shrinkage on the breeding-grounds was, due to the work of poachers, yet that would not, could not, explain to my mind the nine-fold greater shrinkage of that supply from the hauling-grounds which must exist, or else 60,000 young males might be easily taken, judging from my notes of such work in 1872."

Again, he writes :—

"As matters stand to-day upon the Seal Islands the situation is very much the same as it was in 1834. Then it was expected that 20,000 seals would be taken, but only 12,000 were secured 'with all possible exertion.' This year it was expected that 60,000 fine skins would be taken, but only 21,000 have been secured with all possible exertion, nearly half of this catch being small, or 5½ lb. to 6½ lb. skins, raking and scraping the rookery margins without a day's intermission from the opening to the closing of the season; of this work in 1890 I give you in this Report the fullest detail of its progression, day to day, the merciful ending of it, ordered so happily by you."

Estimate in reduction in number of males.

In conclusion, Mr. Elliott's estimates of numbers are quoted, showing in 1872-74 some 145,000 to 160,000 able-bodied virile males or "bulls" over six years of age, with a proportion of barren or farrow cows too small to mention; in 1890, 8,000 or 9,000 old males only—

"*many of them absolutely impotent at the beginning of the season of* 1890, *most of them becoming shelly as the season advanced;*"

with about 250,000 female seals "not bearing or *not served* last year and this."

Further statement by Mr. Elliott.

Mr. Elliott is, however, even more precise and definite on the subject here in question in a

communication to "Forest and Stream." He writes:—

New York, May 7, 1891.

"At the close of the breeding season of 1890 on the Pribyloff Islands, after the most careful and extended search, surveying every superficial foot of each one of the fifteen different rookeries with cross bearings from a great number of measured base lines, and giving close attention to the relative number of 'bulls' and 'cows,' *I found on these islands only about 8,700 old bulls, many of them aged, infirm, and actually impotent;* 640,000 females (nubiles, primipares, multipares, and barren), and *no young bulls around or near the breeding-grounds.*

"*In short, since 1885, no young bull seal has been allowed to live and grow after it reached the age of 4 years, if it were possible to secure it;* they have all been regularly killed as they grew up, and their skins sent to London. Therefore these breeding rookeries, during the last six years, have not been permitted to receive the annual supply of fresh male life, which was then, as it is now, absolutely necessary for their perpetuation and support in good form and number. . . . . If, however, these young male seals that live to return next summer are not driven—are not disturbed by drivers on the islands—in four years' time from date, quite a large number of them will have matured so as to be able to take up stations on the rookery-grounds that are to-day vacant, and in the charge of aged and impotent bulls, which state of affairs, bad as it is, must get worse and worse, until these young sires arrive on the field. . . . . *The normal ratio of males to females on the breeding-grounds of the Pribyloff Islands in* 1872-74 *was an average of* 1 *male to* 15 *or* 20 *females.* In 1890 this ratio (despite the deadly work of the open water sealers among the females) *was an average of* 1 *old male to every* 60 *or* 80 *females* (I saw many single harems in which I counted over 100 cows.) . . . . In 1894 the first relief that can possibly come to them will come, provided that handful of young 2-year-old males left alive on the islands last summer is undisturbed by man there next summer and thereafter, and in 1895 the yearlings that were spared last summer such of them as shall return, will have then matured and take their places on the breeding grounds. . . . . But one very important fact should be kept in mind: that fact is that when killing up there is again renewed for tax and shipment, no culling of the driven herds must be allowed: all the seals driven must be taken; for unless this is done, then history will repeat itself—every 3- and 4-year-old male will be killed as it grows up, and the rookeries soon be again deprived of that regular supply of fresh male blood, which is absolutely necessary for their maintenance in their full form and number."

Captain Bryant's evidence referred to in United States' Case.

The evidence given on this subject by Captain Charles Bryant, is not here specially referred to in the United States' Case, but appears in the Appendix to that Case. In his affidavit of April

1892, after stating his experience on the Pribyloff Islands, which extended from 1869 to 1877, he says :—

United States' Case, Appendix, vol. ii, p. 7.

"The whole time I was there there was an ample supply of full-grown vigorous males sufficient for service [illegible] females on the islands, and every year a surplus of vigorous bulls could always be found upon the rookeries awaiting an opportunity to usurp the place of some old or wounded bull, unable longer to maintain his place upon the breeding-grounds. I should except from this general statement the seasons of 1873 and to 1875, when the destruction of young males in 1868, and the error made by the Company under their misapprehension [illegible] character of the skins to be taken for market perceptibly affected the males on the breeding-grounds. It is not certain that the fertilizing of the females was [illegible] affected, and this gap was filled up, and from this time on there was at all times not only a sufficiency but a surplus of male life for breeding purposes."

Previous official Reports by the same officer in 1875.

As Captain Bryant's notes on the condition of the breeding-islands contained in his Reports, furnished to Professor Allen and published in that writer's monograph, afford some of the most trustworthy information respecting the earlier period of the United States' management, it is necessary to point out that Captain Bryant's recollection of these events, as embodied in the above-mentioned affidavit, is not entirely accurate.

In his official Report for 1875, addressed to the Secretary of the Treasury, Captain Bryant writes as follows :—

H. R., Ex. Doc. No. 83, 44th Cong., 1st Sess., pp. 175–178.

At time of writing my detailed Report on the habits of these animals, dated the 30th November, 1869, it was stated to be 100,000. This number was based on the best information obtainable at that time from the natives of the island and the few employés of the former Russian Fur Company remaining in the territory. Since then a residence of seven successive seasons on the island, in charge of these animals, has furnished me with the desired opportunity for determining this surplus product by actual study of their habits and requirements, and the result is, *the killing of 100,000* [illegible] . And, as it is desirable to [illegible] some of the methods by which these conclusions have [illegible] the effect of the killing of 100,000 [illegible]

[illegible] growing up has to run the gauntlet for his life [illegible] third, and fourth year before he escap[illegible]

breeding bull. Thus it will be seen the method of killing does not admit of the setting apart of a special number and taking the remainder for the quota for market, and the only possible way to preserve the requisite number for breeding purposes is to restrict the number to be killed so far within the product as to insure enough escaping for this object.

"When the lease was put in practical operation in 1871, there was a very large excess of breeding males on hand; since then this surplus has been diminished by the dying out of the old seals faster than there has been younger seals allowed to escape and grow up to fill their places, until *the present stock is insufficient to meet the necessities of the increasing number of breeding females.*

* * * *

"One other cause should be stated that has directly contributed to diminishing the present stock of breeding males. During the season of 1868, before the enactment of the prohibitory law, the several parties sealing there took 240,000 seals monthly [*sic* mostly ?] of the products of the years 1866 and 1867. These would have matured and been added to the present stock of breeding males in the years 1872 and 1873, and to this a part of the prospective deficiency is to be attributed.

* * * *

"Constant and careful attention has been given to the condition and changes in the different classes of seals, and the data kept for comparison from year to year, and the result, as summed up the present year in comparison with 1870, shows the present stock of breeding females has steadily increased in a ratio of 5 or 6 per cent. per annum added to the original stock, *while the stock of breeding bulls has decreased*, by loss from age and other causes, *so much faster than there has been young seals grown up to replace them, that its present condition is only equal to the present demand, and the stock of half-bulls, or those to mature in the next two years, is not sufficient to meet the wants of the increase in the females.* Under these circumstances, I feel it my duty to recommend that for the next two years the number of seals to be taken for their skins be limited to 85,000 per annum, to be apportioned between the two islands as follows: for St. Paul's Island 70,000, and for St. George Island 15,000."

It will be observed from the above that, in his contemporaneous Report, Captain Bryant attributes the deficiency of males *primarily* to the high rate of killing, though he also mentions the excessive slaughter of 1868, as a secondary cause.

In 1876.

In his evidence given before a Committee of Congress in the following year (1876), Captain Bryant testifies to substantially the same effect:—

"*Q.* Your opinion, then, is that the number of 100,000 on the two islands, authorized by law, can be regularly

H. R., 44th Cong., 1st Sess., Report No. 623, p. 99

taken without diminishing the crop or number of seals coming to the islands?—A. I don't feel quite sure of that, as will be seen in my detailed Report to the Secretary of the Treasury, included in the evidence which has been laid before the Committee. There were indications of diminution in the number of male seals.

"I gave that and another reason, which I explained at large in that Report. In the season of 1868, before the prohibitory law was passed or enforced, numerous parties sealed on the islands as well, and took about 250,000 or 250,000 seals. They killed mostly all the product of 1866–67."

In 1880.

In his statement drawn up for Professor Allen, again, Captain Bryant writes:—

"Monograph of North American Pinnipeds," p. 399.

"The decrease in the number of breeding males may be considered as having reached its minimum [sic] in 1876. In 1877, the last season I spent at the islands, there was an evident increase in the number of this class."

Mr. W. B. Taylor, 1881.

Mr. W. B. Taylor was Assistant Treasury Agent on the Pribyloff Islands in 1881. Before the Congressional Committee in 1889, from his experience gained during that time, he testified as follows:—

H. R., 50th Cong., 2nd Sess., Report 3883, p. 59.

"I believe that the capacity of the bull seal is limited, the same as any other animal, and I have very frequently counted from thirty to thirty-five, and even, at one time, forty-two cows to one bull. *I think if there were more bulls there would be less cows to one bull and in that way the increase would be greater than now.*"

Dr. H. H. McIntyre, 1882.

Dr. H. H. McIntyre also writes:—

United States' Case, Appendix, vol. ii, p. 52.

"I was, therefore, always alert to see that the due proportion of breeding males of serviceable age was allowed to return to the rookeries. This was a comparatively easy task prior to 1882, *but became from year to year more difficult as the seals decreased.*"

Mr. T. J. Ryan, 1886.

Mr. T. J. Ryan, Assistant Treasury Agent in the islands in 1885 and 1886, includes the following remarks in his Report for 1886:—

H. R., 50th Cong., 2nd Sess., Report 3883, p. 217.

"As the Report will show, we killed but few bulls, though the Company was authorized to kill down all old troublesome fellows coming in their way to the number of thirty, the skins of which were wanted by the natives for door mats. *The surplus could be reported as I found did not make their appearance* in the drives or on the rookeries this season; and, I think now, nor last season either.

Mr. W. Palmer, 1890.

On this subject Mr. W. Palmer, of the United States' National Museum, may also be quoted.

As the result of his observations in 1890, he writes :—

British Commissioners' Report, p. 188.

"Forest and Stream," October 29, 1891.

"It will be seen also that by this driving process the 2- or 3-year-olds, which are the only ones fit for their skins, are called out almost exclusively from the seals which visit these islands, and there are that very few [illegible] seals [illegible] [illegible]"

Dr. W. H. Dall, 1891.

In an editorial article published in the same number of "Forest and Stream" as that in which Mr. W. Palmer's paper on the "Fate of the Fur-seal" is reported, it is stated that such well-known naturalists as Drs. Dall, Gill, and Beard participated in the discussion of the paper before the Biological Society at Washington. In this article Dr. Dall is cited as follows :—

"Dr. Dall attributes the present decline of the fur-seal chiefly to the excessive killing of young males : there is now a sufficient number of males in the breeding grounds to [illegible] the species. He admits that the method of driving referred to by Mr. Palmer is also very destructive. The excessive destruction of males began in 1872 and has continued to the present time."

Ibid., November 5, 1891

In a letter written by Dr. Dall and published in a succeeding number of the same journal, he states that his remarks on Mr. Palmer's paper were not correctly reported. He writes :—

"What I did say was to intimate that after the killing in the open sea the most important factor in the diminution, the second factor was the *killing of too many young males* rather than the injuries caused by driving; the latter being a view much insisted on by Mr. Palmer."

Accepting Dr. Dall's correction, it is to be remarked at least that he recognizes three factors tending to diminution of the species, of which two are connected with the practices on the Pribyloff Islands.

Lutké, 1827

Even so long ago as 1827, Lutké, who visited the Pribyloff Islands in that year, clearly pointed out the inherent danger to the continued supply of virile male seals which must result from the methods followed. He writes :—

"Voyage Autour du Monde," tome 1, p. 162.

"La précaution de séparer les [illegible] mâles [illegible] qui [illegible] [illegible] [illegible] pour [illegible] [illegible] [illegible] cette précaution est-elle suffisante

pour cela? Si tous les jeunes sont exterminés, d'où sortiront à la fin les gros mâles? Les chasseurs expérimentés ont observé que les ours marins vivent de quinze à vingt ans; il en résulte qu'avec cette méthode dans vingt ans il ne doit plus en rester un seul."

Requisite proportion of males to females, and increased size of "harems."

The requisite proportion of males to females (requisite for the mere purposes of proper service and without reference to the wider questions depending on the natural excess of males about the breeding islands) has been carefully investigated by the British Commissioners, who conclude that at least one virile male is required for every twenty females. They write:—

British Commissioners' Report, paras. 54–56, 292, 294, 436.

"When therefore we find the harems in the Pribyloff Islands growing yearly larger, at the present time they suggest a disproportion above twenty and even in eight times. It is not impossible to conclude that in this case the effect of an excessive number of young male is indeed apparent. Our own and all other local observations on the rookeries during the last few years prove it is no uncommon event to find a single male secured with a harem numbering from forty to fifty, and even as many as sixty to eighty females."

Appendix, vol. i, p. 140.

The excessive number of females in proportion to males is also remarked by Mr. Macoun, in his Report for 1892. He also shows that the few unattached old bulls found about the rookeries are not all virile.

Other changes resulting from the same cause and affecting the habits and mode of life of the seals, evidenced in irregularity and overlapping of dates of landing, birth, &c., have also been observed, and it is obvious that under the circumstances the breeding-islands tend to become less attractive to the females, which consequently resort less punctually and for shorter times to them.

British Commissioners' Report, paras. 424–436.

Mr. H. W. Elliott on barren female.

Further evidence of the paucity of males can be found in the increased number of barren females. Mr. Elliott has already been quoted on this subject. The same fact is referred to by the British Commissioners, and is stated to have been particularly noticed by pelagic sealers.

British Commissioners' Report, paras. 432–433.

Evidence of pelagic sealers as to barren female.

Many of the sealers whose evidence has been obtained in 1892 refer directly to the taking of large numbers of barren females. The following notes on this subject are based upon the statements of sealers contained in the Appendix:—

Captain J. D. Warren.—Not half the females taken on the coast are with young. **British Commissioners' Report, paras. 644–646.**

Captain W. O'Leary.—Perhaps two-thirds the cows are with young.

Captain W. Petit.—More barren cows are killed than those bearing young.

Captain W. E. Baker.—The percentage of barren females considerable.

Captain C. N. Cox.—10 per cent. barren females.

Captain T. M. Magnusen.—12 to 14 per cent. of females bearing; others barren.

Captain W. Cox.—15 per cent. of catch barren females.

Captain Charles Hackett.—Quite a number of barren cows.

Captain C. McDougall.—One barren cow to ten bearing.

Captain S. S. McLean.—About 5 per cent. of females are barren.

Captain C. J. Harris, master of the "Mary Taylor" in 1892, says: "We secured quite a number of barren cows this year."

Charles Le Blanc, hunter.—In 1892 got "a good many barren cows both on the coast and on the Asiatic side." **Appendix, vol. ii, pp. 43–149.**

Captain A. Douglas, eight years in the sealing business, says: "I have seen a great many barren females."

G. Roberts.—Found about one-half of his catch of female seals in 1892 to be barren cows and young females.

Captain R. O. Lavender.—Five years' experience; finds that on the coast he gets over one-third his catch in females, of which less than one-half are barren cows.

F. Campbell.—In 1892 took 65 seals, of which 20 or 25 were barren females.

W. G. Gordie.—Says that about half the females he took on the coast were with pup; the other half barren cows and young females.

J. N. Hooke.—States that during the season of 1892 he secured quite a number of barren female seals.

J. Shields (who has hunted seals in Behring Sea for four years) says: "Every year that we went into Behring Sea we got barren cows."

G. F. French.—States that of the females he got on the coast 25 per cent. would be with young; the remainder barren cows and young females.

O. Scarf.—Six years a hunter; five years in Behring Sea. Got barren cows every year.

A. Matheson.—Seven years' experience, says: "More than half the seals I got on the coast in each year were barren cows. Most of these were young females and barren cows."

E. Rawlose.—Has, both along the coast and in Behring Sea, seen barren cows—good full-grown cows.

J. O'Quinn.—Two years' experience as a hunter, says: "In both years I have been sealing I have got a good many barren females, principally on the coast. At least two-thirds of all the females I got were barren."

P. Lodge.—Says that he has killed barren cows, and that they were principally old seals.

Captain A. Reppen.—Nine years' experience, states that quite a number of barren females are killed on the coast.

W. Hogg.—Five years' experience as boat-steerer and one as hunter. Took, in 1892, 168 seals, of which 25 or 30 were barren cows, and says: "The hunters I was with in former years got about that number of barren cows. They generally travel with young bulls."

Captain H. B. Jones.—Five years' experience—three as master—says: "This year I noticed a good many barren females. My hunters often called my attention to this this year, and we would examine the seal and find that it was a cow, but that there was no young one in her. I never noticed this before to such an extent as this year."

Captain E. Cantillion.—Four years' experience. Has found a good many barren cows among the seals he has taken.

H. B. Smith, twelve years' experience in North Pacific, says that early in the season about half the seals taken on the Vancouver coast are females, and of these only about half are in pup.

A. Billard says about one-half of coast catch are females, and of these about one-fourth are in pup.

Captain A. R. Bissett states that of 568 seals taken on the coast in 1892 about half were females, but not more than 70 or 80 were in pup.

W. De Witt.—About half the females taken are in pup.

F. W. Strong thinks about half the females taken on the coast are in pup.

N. Morrison took, in 1891, 119, of which about half were females; not over 30 of these were in pup. In 1892, of 202 seals taken, about 65 were females, about half in pup, and half barren and young females.

J. D. Warren says that about half the females taken on the coast were young seals and barren cows.

C. O. Brown says there was a number of barren cows in the Bering Sea in in 1891, and that in 1892 a good many barren cows were taken.

W. H. Hearn states that about half the females taken by him in 1891 and 1892 were in pup, and that but one-third of those taken by him in Behring Sea in 1891 showed signs of milk.

J. Brown, six years' experience, on barren cows on the coast, say you don't know that in Behring Sea he could not tell whether the cows were barren or not; very few were giving milk in their breasts.

J. Stone says that in 1890 most of the females taken by him were young; females and barren cows; in 1891, about half the females taken were barren cows and young females; in 1892, about three-fifths of the catch were females; "nearly all of the rest were barren cows. Only a few cows with pup were got. . . . . The 'General' was four or five days about 20 miles off shore from Mount St. Elias in June. The hunters got about 200 seals there, and none of them were barren cows. This fact was particularly noticed when the seals were brought on board and skinned. Neither my self nor any person on the 'General' had ever seen so many barren cows before."

W. Hearn states that he frequently takes cows without pups or milk.

G. Scott each year takes "quite a number of barren cows."

G. West estimates the number of barren cows taken by him at from 20 to 25 per cent. of the number of females.

Captain C. Lothian says: "About one-fifth of the cows taken are barren."

C. Hartman says that he has killed "a great many large cows that had no milk, and are not carrying pup."

M. Scott says: "On the coast this year [1892] we got very few cows carrying pup. I know this, because we were trying to get a number of unborn pups, and found it difficult to get what we wanted. Of the total take of cow along the coast—about 300—not more than 100 were pregnant, the others being too young to breed or barren cows." He has also taken barren cows in Behring Sea.

Captain J. S. Worth has "taken some barren cows that had neither pup nor milk."

M. Kafe states that his vessel took, in 1892, 180 seal on the coast, of which very few were cows, and none in pup. This was remarked at the time by the hunters and crew as something unusual. His experience has been that not more than 20 females in 100 taken are in pup.

J. Chase says that none of the females he got on the coast in 1892 were females in pup; "they were either young cows or barren cows." In previous years about one-half were young and barren cows.

A. P. [illegible]

C. [illegible]

E. A. [illegible]

C. E. [illegible]

W. [illegible] in [illegible] [illegible] mile.

W. C. [illegible] employed here. [illegible]

J. E. P. [illegible] had [illegible] cows.

J. P. [illegible]

J. W. C. [illegible] branch.

A. W. F. [illegible]

A. M. G. [illegible] cows were [illegible] [illegible] cows carrying a [illegible]

A. M. K. [illegible]

G. H. O. [illegible] tender of which [illegible] warehouse.

C. C. [illegible] have yearlings [illegible] season [illegible] would [illegible] 100 to 150 [illegible] fence.

C. [illegible] *W. P.* [illegible] larger females [illegible] often [illegible].

C. [illegible] *W. P.* [illegible] the [illegible] larger [illegible] 150 to 160 [illegible] males.

C. [illegible] *C. T. D.* [illegible] were a good [illegible] this year.

A. S. [illegible] time deposition was [illegible] fence [illegible] among those [illegible]

[illegible] who took 138 seals before the 17th June, 1892, says: "There were very few barren females among the seals I got."

G. F. Freed, three years' experience as hunter, says: "Out of the 143 seals taken by me this year between 30 and 40 were barren; not more than 60 of the seals taken by me were females; more than half were barren cows."

P. [illegible] states that in 1892 of thirty females a few were barren cows.

J. Matson says: "I [illegible] noticed a good many barren cows among those taken, but not any this year."

Captain H. F. Stockwell says: "I only noticed one or two barren females in my catch."

F. Morton says: "We get plenty of barren cows."

P. Carlson found that a [illegible] many cows to the north of Sitka had neither pups nor milk in them.

D. A. [illegible]: "I have killed barren cows, but it is a matter I have not noticed very closely."

P. H[illegible]: "I have killed plenty of barren cows."

J. Carlson says: "[illegible] many barren cows."

[illegible] Evidence.

[illegible] Appendix, vol. ii, pp. 140-166.

[illegible] pups. [illegible] there would be more milk [illegible] if the seals had [illegible] pups in them.

[illegible] Indians who were examined with [illegible] of [illegible] the village of [illegible] "[illegible] were out pups."

D[illegible] and *C[illegible]* say that never out [illegible] would be carrying young.

[illegible] "[illegible] taken along the [illegible] pups. [illegible] barren [illegible]

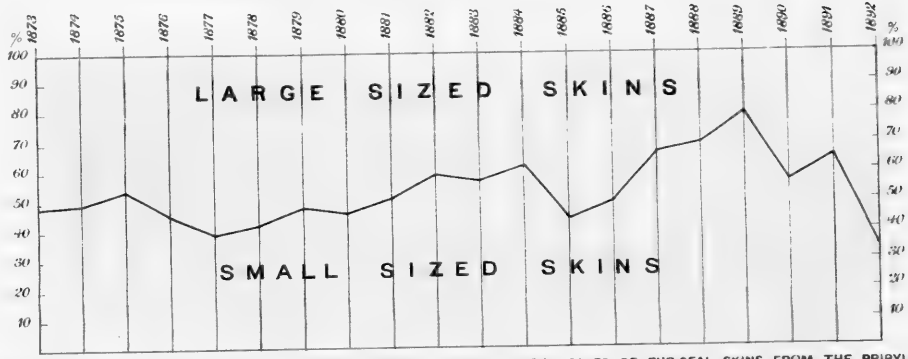
[illegible] "[illegible] cows] [illegible] pups or giving no milk."

"[illegible] in pups in [illegible] pups."

[illegible] sometimes got [illegible] milk. Of lactating [illegible] many did not have [illegible]

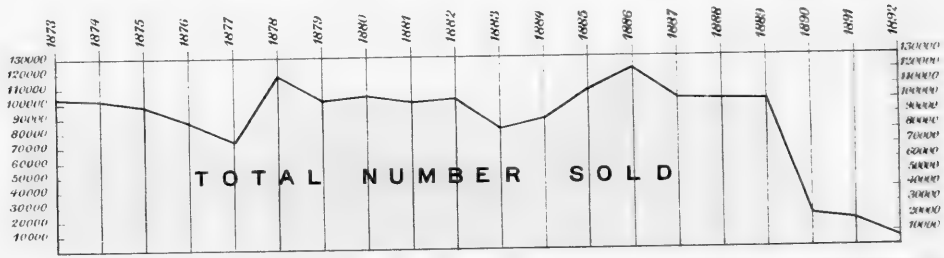
[illegible] what Chek-la-houto [illegible] the same as his.

DIAGRAM COMPILED FROM TABLE I, APPENDIX, VOL. II, PAGE 255.



PERCENTAGE OF SMALL SIZED TO LARGE SIZED SKINS COMPRISED IN THE TOTAL SALES OF FUR-SEAL SKINS FROM THE PRIBYLOFF ISLANDS IN EACH YEAR, FROM 1873—1892, SHOWING THE INCREASED PROPORTION OF SMALL SIZES UP TO THE YEAR 1889.

LARGE SIZES SKINS in the above diagram comprise "Wigs," "Large Middlings," "Middlings," "Middlings and Smalls," "Smalls," and "Large Pups."
SMALL SIZES SKINS comprise "Middling Pups," "Small Pups," "Extra Small Pups," "Extra Extra Small Pups," "Grey Pups," and "Black Pups."



TOTAL NUMBER OF FUR SEAL-SKINS FROM THE PRIBYLOFF ISLANDS, ACTUALLY SOLD IN LONDON IN EACH YEAR FROM 1873—1892.

Cata[illegible] says: "I did not get any old cows this year that did not have pups in them, but have seen plenty."

Ehenchosot has taken a few old cows without pups in them.

Atela and *Ah-ach-gook* have often killed old white-whiskered cows that have no pups in them.

Qui-an-ah says that he gets old [illegible] pups.

[illegible] and [illegible] present when Enoeto was examined testify to the truth of his statement.

High-cit-tch-shot sometimes takes old cows that are not carrying pups and [illegible]

[illegible] cows have no pups in them.

See-ah-ann and *Wan-ton* corroborate what Quisto says.

Sante, Charlie, Gus, Douglas, Joe, Taylor, and *Tomaie* all took barren females in 1892, but kept no count of their number.

Skins of females increasing in Pribyloff catch.

Appendix, vol. ii, pp. 245-250.

No less than eight of the London fur merchants, in statements made by them, explain that, while formerly the consignments from the Pribyloff Islands were exclusively composed of male skins, for the past six years a marked and increasing number of female skins has become noticeable, the presence of which they attribute to the fact that the lessees have been experiencing a difficulty in obtaining their quota of males, and have been compelled to resort to the female seals to make up their full number.. Such skins were first noted by Mr. Rice as early as 1878, and in later years have continually increased.

Ibid., p. 246.

Table showing sizes of whole Pribyloff catch for twenty years.

Ibid., p. 255.

In this connection, particular attention is drawn to the Analytical Table, prepared by Messrs. P[illegible] Poland and Son, of all catalogues relating to the sale of skins from the Pribyloff Islands from the year 1873 to 1892, from which it appears that, from 1877 to 1890, the proportion of small skins in each year's consignments had been rapidly increasing each year, the proportion in 1873 being 39·74, and in 1889 as much as 79·59, showing conclusively that the company were co[illegible]ed by the dearth of male killable seals to [illegible] extensively to younger and smaller seals not formerly regarded as killable. (See Diagram.)

Lower nearly continuous diminution in size of skins taken.

The facts disclosed by this Table and the diagram based thereon are of considerable importance, inasmuch as it affords a complete record of the nature of the killing in [illegible]

British Columbia Sessional Papers 1902

British Columbia Sessional Papers 1902

ments quoted above from official Reports are erroneous, it must follow that the officials in charge of the islands were untrustworthy or incompetent, and in either case subsequent and retrospective statements by the same men cannot be successfully appealed to in evidence.

CHAPTER XIV.

Management of the Pribyloff Islands by Russia and by the United States—(continued).

The "Driving" of Seals and its effects.

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 147—
"A herd of seals is as capable of being driven, separated, and counted as a herd of cattle on the plains."

(2.) United States' Case, p. 152—
"The most stringent rules have been and are enforced by the Government to prevent any disturbance of the breeding seals."

(3.) United States' Case, p. 153—
"I do not see how it is possible to conduct the sealing process with greater care or judgment."

(4.) United States' Case, p. 158—
"In fact it may be questioned whether any seals are ever killed on a drive, except now and then one by smothering."

(5.) United States' Case, p. 158—
"The effects of over-driving and re-driving . . . . upon the seals which from age or condition are unfit for killing, is of little or no importance in relation to so-called life on the islands . . . . Certainly, no male seal thus driven was ever seriously injured or his virility affected by such re-driving."

SUMMARY OF BRITISH REPLY.

The methods actually practised in taking seals upon the Pribyloff Islands are rightly included under the head of management, and of the scene of the most injurious to seal life is the practice of "driving."

The process of "driving," as practised on the Pribyloff Islands, is not only in itself cruel, but is excessively destructive. Seals often, on a scale being driven, but a more serious loss is brought about by the enfeeblement of the productive powers of seals so driven.

Even in 1842, a man's hearing out these statements may be found in the Russian Records; and Messrs. Elliott and Maynard, in 1872-74, also allude to similar facts. In 1890, however, when attention had been drawn to the deterioration of seals upon the Pribyloff Islands, Messrs. Elliott, Goff, Lavender, and Palmer—all officials of the United States Government—concur in attributing the serious effects to "driving."

The British Commissioners refer to the same effect, and point out in particular the increased injury inflicted by the process of driving under the circumstances at the time of their investigations (in 1891) actually existing on the Islands, when great disturbance was caused on the breeding rookeries, and considerable numbers of breeding females were gathered up with the young males in the corkscrew to collect drives. The United States Commissioners practically admit the existence of the same evils.

Driving" a most injurious feature in methods practised on Pribyloff Islands.

The actual method of taking seals upon the Pribyloff Islands is a subject which also rightly falls under the head of the management of these breeding resorts of the seal. If the skins of seals are to be obtained for the use of man, the animals must be killed, and the precise method of the killing is a matter of comparatively small importance. There is, however, one special feature incident to the mode of taking seals upon the islands which, from the loss occasioned by it, has had a direct effect on the whole number of seals, and has operated particularly in the direction of reducing the already too small number of virile male seals, and in aggravating materially the result of a too high rate of killing. This is the practice known as "driving." Surrounded on the "hauling-grounds"—which so long as the normal conditions prevail, and before the reduction in numbers became serious, were at least theoretically separate from the actual breeding rookeries—the seals are driven overland to the killing places. A certain proportion is then selected for killing; and the remainder, consisting of males too young or too old for profitable killing, or of females accidentally gathered up from the margins of the breeding rookeries proper, is allowed to escape and to return to the water.

Its unnatural and destructive character.

In explanation of the general results of the practice of driving animals for considerable distances [illegible], which, by their organization [illegible] movement in the sea alone, reference may be made to another page, where the marine habits and mode of life of the fur-seal are spoken of, and [illegible] William Flower, Professor Allen, and other authorities are quoted in support of facts in connection with this, which have never, till in the Case now presented by the United States, been questioned. The specific evils which experience has proved to follow from the practice in question, in the case of the fur-seal upon the Pribyloff Islands, may here be pointed out by

see pp. 104 *et seq.*

means of the recorded observations. Apart from the cruelty inherent in the mere process of driving animals so organized, the actual effects of the operation have been found to show themselves in the death by the way, from exhaustion, of driven animals; the impaired or totally destroyed virility of the males thus frequently driven, and the disturbance caused by such driving, leading to the avoidance of the breeding-islands, or to their abandonment by large numbers of seals.

Evil effects increased with increasing scarcity of killables.

It will be understood that, when large numbers of young "killable" males still existed upon the islands, the evils mentioned were comparatively small, but with the increasing scarcity of "killable" seals; ever larger numbers of those of other classes were necessarily driven in the efforts to secure the "quota," and of those thus uselessly driven many were included again and again in succeeding drives. While as the "hauling-grounds" became, in consequence of the decreased number of bachelor seals, less and less clearly separated from the breeding-grounds, considerable numbers of females engaged in suckling their young upon these grounds became unavoidably included in the drives. At the time at which Mr. H. W. Elliott recorded his observations of 1872-74 in his official Report which formed part of the records of the 10th Census of the United States, and was reprinted by the United States' Government, with slight alterations, in the "Fishery Industries of the United States," he held the view that the mode of taking and killing the fur-seal upon the Pribyloff Islands could not be improved upon; yet even in this monograph, which has ever since remained the principal source of information on the fur-seal of the North Pacific, the following references to driving are found:—

Observations by Mr. H. W. Elliott 1872–74.

Census Report pp. 71, 72.

"A [illegible] head of [illegible] and noses [illegible] may be driven [illegible] they can [illegible] expenditure [illegible] many lives, however [illegible] the speed of 4 miles or 4½ miles per hour, but [illegible] done."

Further on he speaks of the disposition of the old seals to fight—

"[illegible] the portion [illegible]"

and on the next page writes:

"[illegible] progress [illegible] the [illegible] a succession [illegible] only few minutes."

the seals pausing to catch their breath, and make, as it were, a plaintive survey and mute protest. Every now and then a seal will get weak in the lumbar region, then drag its posterior along for [illegible] distance, finally drop breathless and exhausted, quivering and panting, not to revive for hours—days, perhaps—and often never. During the driest driving days, on the second day, when the temperature does not condense with water, to keep the path moist and cool, quite a large number of the weakest animals in the drove will be thus left out and left on the track.

Loss of seals due to "driving" at that time.

[illegible]

"This prostration from exertion will always happen, no matter how carefully they are driven, and in the longer drives, such as 24 and 5 miles from Zapadnie on the west, or Polovine on the north, to the village at St. Paul, as much as 3 or 4 per cent. of the whole drive will be thus dropped on the road; hence I feel satisfied, from my observation and close attention to this feature, that a considerable number of those that are thus rejected from the drove, and are able to rally and return to the water, die subsequently from internal injuries sustained on the trip, superinduced by this over-exertion."

Lieutenant Maynard, 1874.

Lieutenant Maynard, U.S.N., in his Special Report of 1874, also writes:—

H. R., 44th Cong., 1st Sess., Ex. Doc. 43, p. 9.

"[illegible] waste in taking the skins, due partly to the inexperience of the Company's agent, and partly to accidental circumstances of the drive. In making the drive, particularly if they are long on, and the sun happens to [illegible] through the fog, some of the seals become exhausted, and die at such a distance from the rookeries that the skins cannot well be carried [illegible] by hand, and are therefore left upon the bodies."

The observations above quoted are, however, but an amplification and repetition of the still earlier notes of the Russian chronicler, Veniaminov, who, referring to about the year 1842, writes:—

Veniaminov, 1842.

Census Report, p. 141.

[illegible]

Captain Scammon.

Speaking of the natural killing of seals upon the Pribyloff Islands, [illegible] the Russian [illegible] Captain Scammon further says:

"Marine Mammalia," p. 156.

[illegible]

[illegible]

and impaired virility of the survivors, the method has been continuously practised on the islands, with scarcely a word of recorded remonstrance, till within the past few years, the reduced number of seals renewed inquiry and drew attention to the modes employed.

Mr. H. W. Elliott, 1890.

When Mr. Elliott again visited the Pribyloff Islands in 1890—in the light of facts, he felt compelled to change his previously-formed opinions as to the perfection of the methods there in use. He writes as follows* :—

British Case, Appendix, vol. iii. "United States No. 2 (1891)," pp. 56, 57.

"I can see now, in the light of the record of the work of sixteen consecutive years of sealing, very clearly one or two points which were wholly invisible to my sight in 1872-74. I can now see what that effect of driving overland is upon the physical well-being of a normal fur-seal, and, upon that sight, feel warranted in taking the following ground.

"The least reflection will declare to an observer that, while a fur-seal moves easier on land, and freer than any of all other seal, yet at the same time, it is an unusual and laborious effort, even when it is voluntary: therefore, when [illegible] young male seals are suddenly aroused to their utmost power of land locomotion over rough, sharp rocks, [illegible] and mossy tussocks and other equally severe impediments they in their fright even themselves most violently crowd in confused swelterings [illegible] one upon the other, so that many [illegible] smothered to death [illegible] and in this manner of most extraordinary effort, to be urged along over tracts of unbroken [illegible] they are obliged to [illegible] [illegible] Nature [illegible] them to [illegible] [illegible]

[illegible]

[illegible]

* [illegible] is again made from that part of his Report which [illegible]

and courage necessary for a station on the rookery even if it can possibly run the gauntlet of driving through an every sealing season for five or six consecutive years; driven over and over again as it is during each one of these sealing seasons.

"Therefore, it now appears clear to me that those young male fur-seals which may happen to survive this terrible ordeal of seven years of driving overland are rendered by this act of driving wholly worthless for breeding purposes—they never go to their breeding grounds and take up station, they are both mentally demoralized in spirit and in body.

"With this knowledge, then, the full effect of 'driving' becomes apparent, and that result of slowly but surely robbing the rookeries of a full and sustained supply of fresh young male blood demanded by Nature imperatively, for their support up to the standard of full expansion (such as I recorded in 1872-74)—that result began, it now seems clear, to set in from the beginning, twenty years ago, under the present system."

Mr. C. J. Goff, 1890.

Referring to the same year, and in illustration particularly of the cumulative losses inflicted by this process of driving when the number of young males of "killable" age has become much reduced—losses which must have been in progress for many years, though they did not culminate in intensity till the year 1890—Treasury Agent Goff may be quoted as follows:—

British Case, Appendix, vol. ii "United States No. 2 (1891)," pp. 15, 16. United States' Senate, 51st Cong., 2nd Sess., Ex. Doc. No. 49, pp. 4, 5.

"Now in counting the [illegible] I have counted all the 2-year-olds and upwards [illegible] year-olds begin [illegible] with killable [illegible] [illegible] seven [illegible] [illegible] seven [illegible] [illegible] worked.

"We opened the season by a drive from the Reef rookery [illegible] when we should have [illegible] 15 per cent of the total taken,

and we closed the season by turning away 86 per cent., a fact which proves to every impartial mind that we were redriving the yearlings, and considering the number of skins obtained that it was impossible to secure the number allowed by the lease, that we were merely torturing the young seals, injuring the future life and vitality of the breeding rookeries to the detriment of the lessees, natives, and the Government."

Mr. A. W. Lavender 1890.

Agent A. W. Lavender, reporting upon the same point, says:—

British Case, Appendix, vol. iii. "United States No. 2 (1891)," p. 21. United States' Senate, 51st Cong., 2nd Sess., Ex. Doc. No. 49, p. 9.

"All the male seals driven should be killed, as it is my opinion that not over one-half ever go back upon the rookeries again."

Mr. W. Palmer 1890

Another, and entirely independent observer, also referring to the year 1890, in which interest became directed to the state of the rookeries and the causes of their decline, is found in Mr. W. Palmer, of the United States' national museum. In a paper read before the Biological Society of Washington after his return from the Pribyloff Islands, Mr. Palmer treats this subject at considerable length, and evidently as the result of close observation. Following some remarks on pelagic sealing (of which, however, he does not profess to speak from personal knowledge), he writes:—

"Forest and Stream," October 29, 1891. British Commissioners' Report, pp. 187, 188

"But pelagic seal fishing is not the only cause of the decrease of seal life on the Pribyloffs.

"Probably an equal cause is the unnatural method of driving seals that has been followed on the islands since the first seal was captured.

"The mere killing of seals as conducted on the islands is as near perfection as it is possible to get it. . . . But the driving is a totally different matter. I doubt if any one can look upon the painful exertions of this dense crowding mass, and not think that somewhere and somehow there is great room for improvement. It is conducted now as it always has been; no thought or attention is given to it, and, with but one exception, no other method has been suggested, or even thought necessary.

* * * *

"The fur-seal is utterly unfitted by nature for an extended and rapid safe journey on land. It will progress rapidly for a short distance, but soon stops from sheer exhaustion. Its flippers are used as feet, the belly is raised clear from the ground, and the motion is a jerky but comparatively rapid lope. When exhausted, the animal flops over on its side as soon as it stops moving, being unable to stand up.

* * * *

"The character of the ground over which the seals are driven is in many places utterly unfit for the purpose, up and down the steep slopes of sand dunes, over cinder falls

Mr. Palmer's statement of the case delivered.

Mr. Palmer then states that he [illegible] to result chiefly from the consumption [illegible] natural store of fat while the animal [illegible] exhausted to go in search of food. He [illegible] thus:—

[illegible]

After speaking of the care exercised in regard to the driving of seals upon the Russian (Commander) Islands, Mr. Palmer contrasts the state of affairs as observed by him on the Pribyloff Islands as follows:—

[illegible]

The British Commissioners, in treating the subject of driving seals on the islands, and its effects, say:

British Commissioners on effects of driving.

British Commissioners' Report, para. 704.

[illegible] However safeguarded or regulated, [illegible]"

This process of driving is then explained and examined, and instances of its effects, as noticed by the Commissioners themselves, are given; and the following further remarks are made:

Ibid., para. 707

[illegible] is [illegible] exception could be taken to the [illegible] method, [illegible] upon the [illegible] even [illegible] conditions of former [illegible] to drive to the killing place [illegible] either too young or too old to be killed."

Attention is then called to [illegible] aggravation of the evils incident to driving when the whole number of "killable" seals becomes much reduced, and, in particular, where it is under such circumstances still attempted to secure a large annual "quota" of skins. The necessary injury to vitality in the case of the seals driven but not killed is noticed, together with the fact that sucking [illegible] the dives.

Female in Pribilof Islands.

On the point last alluded to it [illegible]:

United States Commissioners' Report, p. 716.

[illegible]

Appendix, vol. [illegible], p. [illegible].

Referring to his observations on the Pribyloff Islands in 1892, Mr. [illegible] also reports that, in 1892, he counted the seals killed and those allowed to escape from the drives, and that the number killed varied [illegible] 17 per cent. of the whole number driven. [illegible] from the killing-grounds [illegible] and that about [illegible] were driven, [illegible] were found.

To show that the [illegible] of seals not killed [illegible] is no new thing, [illegible] may be quoted. In the [illegible] particularly to the year 1869:—

British Commissioners' Report, [illegible], 715. Pelt. Mus. Comp. Zool., vol. [illegible], Part I, p. 305.

[illegible]

Again speaking of the years 1872-74, Mr. Elliott writes:—

Elliott, [illegible] 717. United States' Census Report, p. 72.

[illegible]

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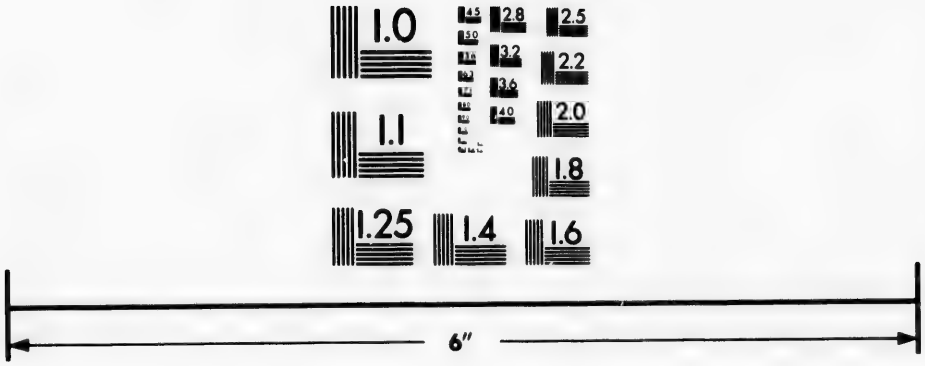

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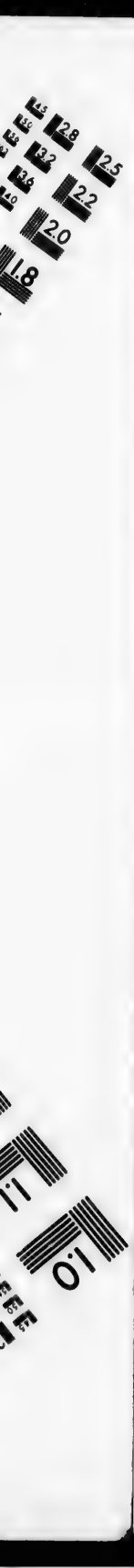
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drive will be found to consist mostly of a large majority of 2- and 3-year-olds, the bulk being 2-year-olds principally, and a very few at wide intervals 5-year-olds and yearlings seldom, if ever, driven up."

Even as early as 1872-74, the major portion of the catch is reported to have consisted of 2- and 3-year-old seals, and under such circumstances the practical impossibility of excluding young females from the number killed is pointed out by the British Commissioners.

British Commissioners' Report, para. 719.

Ibid., paras. 698-700.

See also evidence in United States' Case, p. 203.

On the subject last mentioned, Mr. S. N. Buynitzky's Report of 1870 may also be referred to, where he says that females are easily mistaken for young males even by the natives.

H. R., 44th Cong., 1st Sess., Ex. Doc. No. 83, p. 42.

The special effects produced by the disturbance and alarm of the seals upon the breeding-islands, with other facts, are also treated of in this connection by the British Commissioners; but for details their Report (particularly paragraphs 701-721) should be referred to. In concluding this subject, the Commissioners write:—

"The aggregate loss incurred is thus the result of various causes, which together involve the killing of many seals which ought not to be killed, and it is evident that the methods of driving and killing on the Pribyloff Islands as now practised are susceptible of very great improvement."

British Commissioners' Report, para. 721.

The United States' Commissioners, though in a very qualified manner, substantially admit the existence of the same evils. Their admission appears to mean in effect that while such disastrous practices have been allowed continuously for twenty years or more, they may at some future time be remedied, if it be thought expedient. They write:—

Statement of the United States Commissioners.

"While there is no doubt that in some instances excessive driving has been allowed, that seals have been driven further than is consistent with the interests and the proper revenue, has not been such as to eliminate the new 3,000,000 seals from possible future drives, where the driving is well under way, these are matters that are so certainly under control that a proper adjustment may be secured at once."

United States' Case, p. 361.

CHAPTER XV.

Management of the Pribyloff Islands by Russia and by the United States—(continued).

Absence of Proper Control by Government Agents.

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, pp. 136, 137—

"The origin and practical workings of the lease of 1870 were made the subject of an elaborate investigation in 1876 by the Committee of Ways and Means of the 44th Congress, who reported that in their opinion, the terms of the lease were highly favourable to the Government and all parties concerned."

(2.) United States' Case, p. 137—

"In a subsequent investigation in 1888 by the Committee on Merchant Marine and Fisheries of the 50th Congress, the same conclusion was reached."

(3.) United States' Case, p. 139—

"It is evident from the nature of the industry that in case the sealing on the islands should be managed directly by the Government the opportunities for fraud and theft are very great on the part of the Agents, who under the Act of 1870, are prohibited from being in any way connected or interested in the industry: as it is now the lessees and Agents are restraints upon each other."

(4.) United States' Case, pp. 139, 140—

"Immediate Government management is at once seen to be impracticable under these circumstances and the present method employed to be the only feasible one.

"The careful investigations made by the Congressional Committees showed that the Alaska Commercial Company had fulfilled the terms of the lease in all respects according to the requirements of the Act of 1870."

(5.) United States' Case, p. 145—

"The handling of the seals on the islands, being entirely done by the natives, is directly under the supervision of the Government Agents."

(6.) United States' Case, pp. 146, 147—

"Under this lease [that of 1890] it is difficult to see how the United States could have a more complete control over the seal industry on the islands, even if it took the entire management of the business. Leasing under such terms gives the Government absolute power in fixing the quota according to the condition of the herd, and at the same time avoids the details of management and disposing of the skins, which are the especial difficulties in the way of the United States working the rookeries itself. The course thus adopted by the United States seems as free from criticism or improvement as any that can be suggested."

(7.) United States' Case, pp. 153, 154—

"The number of seals allowed to be killed annually by the lessees was, from 1871 to 1889, inclusive, 100,000; but this number is variable, and entirely within the control of the Treasury Department of the United States. In 1889 Charles J. Goff, then the Government Agent on the islands, reported to the Department that he considered it necessary to reduce the quota of skins to be taken in 1890."

SUMMARY OF BRITISH REPLY.

The supervision and control of the lessees of the Pribyloff Islands by the Government Agents of the United States has throughout been lax and inefficient, and not such as to afford proper safeguards to seal life upon the islands. Mr. Boutwell, Secretary of State when the leasing of the islands to a Company was first proposed, anticipated this result, and his forecast has been fully justified by events.

The fact that, though reported against from time to time, the quota of skins was allowed for twenty years to stand unchanged at 100,000, is alone sufficient to show that the lessees exercised an influence to the detriment of seal life upon the islands.

The statement made on p. 154 of the United States' Case is wholly misleading, because of its omission of mention of any reports speaking of the injury resulting from the taking of the allowed quota of 100,000 skins, previous to that contained in Mr. Goff's Report of 1889, after which action resulting in a reduction of this quota was first taken. It is known that smaller skins were allowed by the Government Agents to be taken from year to year, at least since 1883, in order to enable the quota to be filled; and this without any check being attempted by the Government.

Official Reports of the United States, including Reports of the Governor of Alaska, with other evidence, show that the lessee Company practically exercised independent control over the whole western part of the Territory of Alaska.

The Company, in fact, controlled the Government Agents, who were in all respects dependent on them. Evidence shows that wholly inexperienced men were sent to the Pribyloff Islands; that they were frequently changed; and that at least several of these Agents were not furnished with instructions by the Government.

The driving and killing of the seals, carried out as a rule by the "natives" of the Pribyloff Islands, can further be shown to have been directly controlled by the Agents of the Company, and not by those of the Government. The same conditions existed in 1892.

The statements above quoted from the Case of the United States are grouped in order to show the nature and amount of the control claimed to have been exercised over seal interests on the Pribyloff Islands, and particularly over the operations of the lessees of these islands, by the United States' Government. It appears to be asserted that, though certain circumstances prevented the establishment of an efficient control from the date of the cession of Alaska in 1867 to 1869,

Summary of United States' contentions as to methods of control by Government Agents.

United States' Case, p. 133.

yet, in 1869, such control was initiated; that the only practicable course open to the United States' Government was that of granting an exclusive right of sealing on the islands to a Company; that, under the lease of 1870, the Government Agents have been prohibited from being in any way connected with, or interested in, sealing; and that such Agents and the lessees are restraints upon each other. Further, that Committees of Congress have, in 1876 and 1888, investigated the operations of the leasing Company, and have found these to be entirely satisfactory; that the conditions of the present lease (beginning in 1890), like those of the previous lease, are such as to give the United States' Government absolute power to fix the "quota" according to the condition of the rookeries; and that the handling of seals upon the islands is carried out under the immediate supervision of the Government Agents being done by the natives, who are directly controlled by these Agents.

United States' Case, pp. 137–146.

See pp. 226 et seq.

The subject-matter of some of these assertions has already been in part dealt with more particularly, in foregoing pages, which treat of the early history of the United States' management of the Pribyloff Islands. Reasons will here be given to justify a belief that the control exercised on the Pribyloff Islands and in connection with the fur-seal industry by the United States through its Agents has throughout been lax and defective; that in many cases the officials of the Company leasing the islands appear in reality to have controlled the Government Agents; that from time to time accusations of improper conduct have been laid against the Agents and officers, both of the Government and the Company; and that, as a matter of fact, the supervision of the natives, and of the handling of the seals there, have practically been under the control of the Company, and not of the Government Agents.

Control by Government Agents in reality ineffective.

This result foreseen by Mr. Boutwell.

Speaking in 1870 of the proposal at that time first under discussion for the leasing of the Pribyloff Islands to a Company for a term of years, Mr. Boutwell, then Secretary of State for the United States, took exception to it on the ground that it would create a monopoly, and added:—

41st Cong., 1st Sess., Ex. Doc. No. 109.

"Moreover, the natives of the islands would be under the control of the Company, and as the expiration [illegible] lease [illegible] and

preserve the fisheries would diminish, especially if the Company saw, as would probably be the case, that it had no hope of a renewal of its privileges. Under these circumstances, the Government of the United States would necessarily be subjected to great expense and trouble. . . . . I am of opinion that it is better that the Government should assume the entire control of the business of the islands, and exclude everybody but its own servants and agents; that it should establish a rigid system of police, excluding from the islands distilled spirits and fire-arms, and subject vessels that touch there to forfeiture, except when they are driven to seek shelter, or for necessary repairs."

Inefficiency of control specially evidenced by non-reduction of quota.

It is submitted that the above remarks of Secretary Boutwell have been entirely justified by the subsequent history of the Pribyloff Islands under the operation of the lease which was entered into not long afterwards. The exact conditions which were foreseen by the Secretary in effect did grow up; and at the expiry of the lease, and even since under the operations of a new lease, some of those best informed on the whole subject are found to advocate the same system of direct Government control as that suggested by Secretary Boutwell.

In connection with the amount and efficiency of the control actually exercised over the operations of the Company on the Pribyloff Islands by the United States' Government, the most important question is that of the number of seals allowed to be killed, and of the relation of that number to the actual state of the seal rookeries on these breeding-islands.

It has already been shown that it was in the power of the Secretary of the Treasury to reduce the number of seals to be killed annually on the islands, but that though repeated official Reports spoke of the deterioration of the rookeries, no such reduction took place. It is, in fact, in the Case now presented by the United States, alleged that, from 1880 to 1884-85, the number of seals resorting to the islands remained stationary, and that in 1884 a marked decrease began, which has since continued. This contention is elsewhere disproved, but even if it be admitted, it is clearly apparent that if the number remained stationary during the years mentioned, the recurrence of climatically disastrous years like these of 1836, 1859, and 1876 would have produced most serious effects. It is, indeed, evident that only the continued increase of the

Admitted in United States' Case that quota remained unaltered while seals stationary or decreasing in number.

United States' Case, p. 164.

Elliott, Census Report, p. 49.
United States' Case, p. 103.
Bryant, in "Monograph of North American Pinnipeds," p. 399.

seals during a succession of favourable years, renders them able to withstand successfully the occasional natural reverses to which they are liable; while from 1884, when it is asserted that a steady diminution first began, the Pribyloff Islands must be admitted to have been in a still more alarming condition.

Quota unchanged during lease of Alaska Commercial Company.

Notwithstanding this, however, no change in the number to be killed, or "quota," was made during the entire term of lease of the Alaska Commercial Company; and it was not till 1890 (this being the first year of the new lease of the North American Commercial Company) that the "quota" was reduced from 100,000 to 60,000.

The British Commissioners, after pointing out the power of regulation nominally vested in the Secretary of the Treasury, write respecting the "quota" of 100,000:—

British Commissioners' Report, para. 47.

"Practically, however, and on grounds not publicly explained, it remained unaltered, and became a fixed limit.'

And, further:—

Ibid., paras. 71–73.

"When a decrease became apparent on the islands, prudence should have dictated some curtailment of the annual slaughter there. . . . . No such curtailment, however, occurred. The Company holding the lease of these islands on fixed terms were not interfered with, but continued to take their full legal quota of skins without regard to the risk to seal life as a whole. Not only so, but instead of reducing the catch, the standard of weight of skins taken on the islands was steadily lowered so as to include a younger class of seals under the designation of 'killables.'

* * * *

Interests of the lessee Company alone regarded.

"The Company holding the lease of the Pribyloff Islands had, of course, its own interests in view, and the period of the lease was drawing to a close; but it must be added that no explanation has been offered by the Government Agents in charge of the islands* of the prin-

* These were: Agents H. G. Otis, H. A. Glidden, G. R. Tingle, and C. J. Goff. (The last-named reported against the continue killing of the "quota," and was removed.) Assistant Agents W. B. Wardman, L. Kimmel, H. G. Fowler, A. P. Loud, T. J. Ryan, J. P. Manchester, W. Gavitt, J. Murray, and S. R. Newton.

The names of several of these officers occur prominently among those of persons now produced in evidence by the United States.

ciples under which they were guided to allow this lowering of standards, with the concomitant encroachment on the limits of breeding rookeries, and the extension of the area of driving to places hitherto held in reserve."

The circumstances thus disclosed by the statements made in the Case presented on the part of the United States, go far towards establishing the statement so frequently made, that the Company holding the lease of the Pribyloff Islands exercised a very powerful influence over the Government officials who were appointed to supervise its operations.

This particular phase of the "control" or "management" exercised by the Government is very lightly touched upon in the Case of the United States, where it is said:—

This assertion, that the "quota" was under Government control, when it remained unaltered, though reduction necessary, is therefore misleading.

"The number of seals allowed to be killed annually by the lessees was, from 1871 to 1889, inclusive, 100,000, but this number is variable and entirely within the control of the Treasury Department of the United States. In 1889 Charles J. Goff, then the Government Agent on the islands, reported to the Department that he considered it necessary to reduce the quota of skins to be taken in 1890. The Government at once reduced the number to 60,000, and ordered the killing of seals to cease on the 20th July."

United States' Case, pp. 153, 154.

It is submitted that the statement above quoted does not represent the facts as they occurred.

The United States' Commissioners write as follows:—

Admissions in United States' Case that unusual and injurious measures adopted to fill unchanged "quota" in late years.

"It is well known that during the last few years *the operating Company had experienced difficulty in finding a sufficient number of high-class skins to fill the quota permitted by the Government*, and that finally that quota was greatly reduced by order of the Representatives of the Government on the islands."

Ibid., p. 338.

On the other hand, Professor J. A. Allen says:—

"During the last two or three years, however, and in consequence of the decline from the former status of the herd, *it has been necessary to lower the age of seals selected for killing, and also to reduce portions of the herd, in order to secure even the greatly restricted quota allowed to be taken in* 1890, the last year of killing for commercial purposes.

United States' Case, Appendix, vol. i, pp. 407, 408.

But these admissions very imperfect, and, consequently, misleading.

It is believed that the admissions contained in the two passages last quoted, are in themselves sufficient to show that no efficient control was exercised in the interests of seal life on the Pribyloff Islands by the United States' Government. But these admissions fall short of the facts as known and recorded in the official Reports of that Government. It has already been shown by reference to these Reports, and confirmed by ascertained facts respecting the skins sold by the Company, that a reduction in the sizes of skins had been deliberately allowed from year to year, at least since 1883, whereas no reduction in number was enforced till 1890, the first year of the lease to the new Company. That the "quota" of 100,000 had, in effect, become a fixed number, as stated by the British Commissioners, is shown by Professor Allen's remarks as to the extraordinary measures found to be "necessary," and practised in order to secure the "quota."

The following notes and quotations afford further evidence of the absence of proper control on the part of the Government:—

H. Mis. Doc. No. 11, 41st Cong., 2nd Sess.

F. N. Wicker, a special Treasury Agent, in respect to the year 1869, stated that, though the law was nominally in force, an inspection of the islands convinced him that more than the legal quota had been taken in that year and the skins sold to traders.

Dr. Dall's charges respecting Government Agents on Pribyloff Islands.

Dr. W. H. Dall, at that time in charge of the hydrographic work in Alaska, under date the 31st August, 1874, addressed a letter to Messrs. Elliott and Maynard, then Commissioners for the United States in respect to the Pribyloff Islands, in which the following statements are made:—

"I have not arrived at that point where I should believe that the Government habitually employs dishonest Agents, though long experience in Alaska might shake any man's optimism.

* * * *

H. R., 44th Cong., 1st Sess., Ex. Doc. 83, pp. 235, 236.

"I will now close this letter with one remark, which has no special connection with the foregoing, but which I believe of some importance. This is, that it would be very desirable that the officers of the United States employed on the Pribyloff Islands should be prohibited from receiving pay from, or rendering services for pay to, the Company whom, practically, they are placed there to watch. That this has occurred in several instances I am aware, and probably in some cases without any improper intent on either side; but it is evident at once that it opens a wide door for scandal, if not for fraud."

General O. O. Howard's observations as to the lessee Company, 1875.

General O. O. Howard, while engaged in his official inspection in Alaska in 1875, was evidently much impressed with the circumstance that the Alaska Commercial Company, the lessees of the Pribyloff Islands, exercised an altogether undue amount of influence there. This is particularly evidenced by the following remarks in his official Report:

H. R., 44th Cong., 1st Sess., Ex. Doc. No. 83, p. 149.

"A citizen of long standing on the coast writes me that the Fur Company who have leased the seal business from the United States' Government make millions of profit; and that their operations are concealed as much as possible; that vastly greater numbers are killed annually, more than their agreement allows, and that large amounts of hush-money are paid to keep the matter quiet."

Ibid, pp. 154, 158, 162.

General Howard transmitted with his Report a document entitled "A History of the Wrongs of Alaska," which was reprinted with that Report as a Congressional document. In it, numerous grave charges, concerning the granting of the lease of the Pribyloff Islands and the conduct of the lessees, were made. Most of these are unimportant in the present connection, but the practices of the Company complained of are said to have been rendered possible—

"principally through the assistance of the United States' revenue officers."

Amongst those specified are Samuel Falkner, at one time Acting Commissioner at Sitka, and H. H. McIntyre, Special Agent of the Treasury Department, who both afterwards became employés of the Alaskan Commercial Company, and both now also appear as prominent witnesses in connection with the Case of the United States.

General Howard observed that he was personally unable to judge of the character of the statements contained in this document, but added:—

Danger of monopoly.

"[I] do believe it to be a mistake, and a dangerous precedent, on the part of the Government, to give into the hands of any Company, however benevolent in its intentions, so vast a monopoly."

Governor Swineford's charges against the Company, 1887.

In his official Report for 1887, A. P. Swineford, Governor of Alaska, writes as follows of the operations and power of the Alaska Commercial Company, which he professes himself to be unable to control:—

"Report of the Governor of Alaska," 1887, p. 32.

"While all this and much more is true concerning its treatment of the native people, instances are not lacking where it has boycotted and driven away from the islands Government officials who, intent upon the honest, faithful discharge of their duties, have incurred the displeasure or refused to do the bidding of its Agents. In fact, it possesses the power to compel compliance with its every exaction, and wherever it has obtained a foothold neither white man nor native can do more than eke out a miserable existence, save by its sufferance."

His complaint of its action.

The actual relations of the Governor and nominal Executive Head of the Territory of Alaska to the Alaska Commercial Company are well illustrated by the fact that he does not hesitate to complain that the agents of the Company undermine his own power at its source, writing :—

Ibid.

"Its paid agents and lobbyists are kept at the national capital to oppose any and every effort that may be made to promote the welfare of Alaska through such legislation as will encourage immigration and the enlistment of capital in the development of the natural wealth hidden away in her forests, streams, and mountains; its every aim and effort is in the direction of prolonging its existence and strengthening its tyrannical hold by a blocking of the wheels of progress."

His characterization of the Corporation.

While on another page he characterizes the same Corporation in the following terms :—

Ibid., p. 34.

"Conceived (as there is abundant evidence to show) in corruption, born in iniquity, and nurtured and grown strong and insolent on ill-gotten gains wrung from a hapless and helpless people, this giant monopoly, which rests like a blighting curse upon the progress and welfare of this great territory, should be shorn of its corruptly-secured, much-abused franchise with no more delay than may be absolutely necessary"

Ibid., pp. 43-45.

In the Appendix to this Report, Governor Swineford prints at length certain specific complaints by the United States' Deputy Marshal at Unalaska respecting the conduct there of the agents of the Company.

Charges reiterated in 1888.

It is proper to remark that the same gentleman, in his Report for the following year (1888), in the face of a "reply" made to his former statements by the President of the Company, repeats these statements. He writes :—

Ibid., 1888, p. 34. Compare United States' Case, p. 138.

"I now and here reiterate every one of those charges, though I know full well that an investigation made by a Committee of Congress, holding its sessions in Washington, and calling as witnesses only those who had been

[illegible] Company's favours, is not likely to arrive at any just conclusion as to their truth or falsity."

In the same Report, Governor Swineford remarks, in close agreement it will be observed with the earlier conclusions of General Howard, as follows:—

His objection to the monopoly.

"I can see no good reason why the present monopoly of the [fur-seal] business may not be abolished, not only without loss to the Government, but to its very great advantage so far as the amount of revenue to be derived is concerned. The present system of farming out the rookeries is not only obnoxious to every sense of right and justice, but, as I think I have shown, is in a very great degree inimical to the best interests of the territory."

"Report of the Governor of Alaska," 1888, p. 44.

Among the duties of the Governor of Alaska, as defined in section 5 of the Act of the 17th May, 1884, entitled "An Act to create a Civil Government for Alaska," is that of inquiring into the operation of the lease of the Pribyloff Islands. The Act provides:—

Duty of the Governor of Alaska to inquire annually into operations of the Company.

"The Governor appointed under the provisions of this Act shall from time to time inquire into the operations of the Alaska Seal and Fur Company, and shall annually report to Congress the result of said inquiries, and any and all violations by said Company of the Agreement existing between the United States and said Company."

Though Governor Swineford succeeded in visiting the Pribyloff Islands in 1888, the circumstances are practically such that it is ordinarily impossible for the Governor of Alaska to carry out the above provision. The capital of the territory, Sitka, is situated at a distance of about 1,200 miles from Unalaska, the nearest place of any importance to the Pribyloff Islands, which lie at a further distance of about 200 miles. There has been no regular means of communication between Sitka and Unalaska till 1891, when a monthly mail was for the first time established for a part of the year. Thus, unless by means of some chance vessel, it has been necessary to send any communications passing from Sitka to Unalaska, or *vice versâ*, by way of San Francisco, involving a sea transit of some 3,500 miles, while from San Francisco to Unalaska there has again never been any regular mail service. It has thus very naturally happened that the whole of the western part of Alaska has been practically beyond the control of the Governor, and that the powerful

The impossibility of execution of this duty.

Company leasing the Pribyloff Islands has exercised there an almost independent sway.

Mr. Elliott on relations of Government and Company's Agents.

Mr. H. W. Elliott, though throughout endeavoring to support the proceedings of the Alaska Commercial Company, does not leave the subject of the ambiguous relations between the officers of the Company and Government entirely unnoticed, writing in his official Report:—

Census Report. p. 167.

"There remains an unwritten page in the history of the action of the Government towards the protection of seal life on the Pribylov Islands, and it is eminently proper that it should be inscribed now, especially so since the author of this Memoir was an eye-witness and an actor in the scene. When he first visited the Seal Islands, in 1872-73, he was compelled to take passage on the vessels of the Company leaving the islands; compelled, because the Government at that time had no means of reaching the field of action, except by the favour and the courtesy of the Alaska Commercial Company. This favour and this courtesy, as might be expected, was always promptly and generously proffered, and has never been alluded to as even an obligation or service rendered the Treasury Department. But, nevertheless, the thought occurred to me at the time, and was strengthened into conviction by 1874, that this indifference to its own self-respect and failure to support properly the aims of its agents up there should end; and that the Treasury Department should detail one of its own vessels to visit, transport, and aid its officers on the Pribylov Islands, and also be an actual living evidence of power to execute the law protecting and conserving the same."

Mr. Ryan on position of Company's Agents.

Mr. Ryan, Assistant Government Agent in 1885-86, states:—

H. R., 50th Cong., 2nd Sess., Report No. 3883, p. 215.

"The Company's men are sailors and men they can pick up as best they can, and, as I have said before, they have been taught by the Government agents not only that everything belongs to them, not only the seal, but the rocks the seal are on.

* * * *

"You had to find out everything to be done from the Company people. . . . . If the Government Agents, I repeat, would do their conscious duty and not place themselves under obligation to the Company, by accepting free transportation, &c., and swearing afterwards that they paid their way, they would be much help to the poor natives."

He further says:—

Ibid., p 213.

"Mr. Morgan and the men under him were somewhat spoiled. The great trouble, Mr. Chairman, there is that the Government officers have not been doing their duty, and they have spoiled the Company, so much so, that they seem to think they not only own the seals, but that they own the whole island.

* * * *

"The officers have not done their duty in showing them [the natives] that the Government owns and governs the islands."

H. R., 50th Cong., 2nd Sess., Report No. 3883, p. 214.

Respecting the inefficient control by the United States' Government, Mr. W. Palmer, of the Smithsonian Institution in Washington, speaks as follows in a paper read by him before the Biological Society in Washington in 1891:—

Mr. W. Palmer on the character of the Government Agents, and their relations to the Company.

"But these drives from Polavina and Zapadnie, and the decrease in seal life, seems to have been carefully concealed from the Government and others interested in the welfare of the seals; in fact, it has been strongly put forth in the Reports of the Treasury Agents in charge and elsewhere that the seals have actually greatly increased in numbers; but a comparison of the sketches alone in Mr. Elliott's 'Monograph of the Seal Islands,' made in 1873-74 and 1876, with the actual condition of affairs at present on the islands, will convince any one that the opinions and Reports of political appointees are almost worthless when dealing with the fate of the fur-seal.

British Commissioners' Report, p. 189.

"How can it be otherwise? Their tenure of office exists only with that of the Secretary of the Treasury; with every change of that office new men who know nothing of seals are sent up, and these men are entirely dependent on the Seal Company even for their passage and board while there. All visitors to the islands are regarded as interlopers and meddlers.

* * * *

"On the Russian side, it is a settled fact that the islands and seals belong to the Russian Government, and that the Company taking the skins has only certain restricted rights for that purpose; but on the American side it seems to be a settled fact, at least in the minds of the Company's people, that they own the seals and the islands, while the duty of the Government is to collect the tax and appoint Agents to subserve the interests of the Company only. The natives are utterly dependent on the Seal Company for their support, and while having a very vague idea that somehow the Government is a big thing, they naturally look to the Company for everything affecting their interests.

* * * *

Resulting danger to seal interests

"I have only touched lightly upon several questions of the sealing industry, and have by no means exhausted the subject; but enough has been said, I think, to show that if an industry which eighteen months ago was expected to pay the Government a net profit of over 2,000 per cent., and is, besides, a great natural exhibit, the only one of the kind America can produce, is to be saved, reform is necessary. For twenty years the fur-seal has been the spoil of politics, and the victim of the poacher. Inexperience on the one hand, and avarice on the other, have well-nigh ruined the industry in American waters."

The Government should take entire control.

Assistant Agent A. W. Lavender, in his Report for 1890, says:—

British Case, Appendix, vol. iii. "United States No. 2 (1891)," p. 21.

"The Government should take absolute control of these islands."

United States' Senate, 51st Cong., 2nd Sess., Ex. Doc. 49, pp. 6, 9.

Treasury Agent C. J. Goff likewise recommends—

Ibid., pp. 17, 18.

"That the Department take the entire matter of protecting these rookeries under its immediate supervision, for I regard any other system of protection dangerous to the future of all interested."

Remarks of United States' Commissioners deploring frequent change in Government Agents.

The United States' Commissioners make the following qualified allusion to the want of proper supervision and control by the Government Agents on the Pribyloff Islands:—

United States' Case, pp. 378, 379.

"In addition to the establishment of such Regulations as would practically suppress pelagic sealing, it is strongly recommended that killing on the islands be subjected to somewhat more strict and competent supervision. While it is not believed that any serious consequences have resulted from looseness in this respect, the interests involved are so important, and in some respects so complicated, that too much care cannot be given to the selection of the proper persons to be intrusted with their conservation. The practice of frequent changes in the Government Agents is deplorable. They should be so familiar through association and observation with the appearance of the various rookeries as to be the first to notice any changes which may take place."

Inexperienced men sent to the islands.

They elsewhere state that, in 1890, the Government Agents sent to the islands were—

Ibid., p. 342.

"new men, inexperienced in matters relating to seal life."

This, it will be remembered, was at a time when the rookeries were specially in need of competent supervision.

Absence of proper instructions to Government Agents.

As additional evidence of the general want of proper control on the part of the Government, it is noteworthy that no proper instructions appear to have been issued to the Government Agents as to their duties on the islands. Incidental proof of this is found in the evidence taken before the Congressional Committee of 1888.

As early as 1871 an allusion to the same matter is found in a letter to the Secretary of the Treasury, dated at St. Paul Island, the 19th May of that year, where Captain Bryant, the Government Agent, writes:—

Captain Bryant.

"In the absence of any instructions I shall be guided by a certified copy of the Act of Congress, authorizing the lease, and the conditions of the lease, as given me by the Company."

H. R., 44th Cong., 1st Sess., Ex. Doc. No. 83, p. 50.

Mr. W. B. Taylor

Again, in the case of Mr. W. B. Taylor, Assistant Government Agent in 1881. This gentleman explains that, when he received his appointment as Treasury Agent, he was Clerk of the Illinois House of Representatives. He says:—

"I did not know where the Seal Islands were at that time; neither did I know what my duties would be. All that I knew was that I should proceed at once to San Francisco to take the vessel. I made inquiry as to the whereabouts of the islands, but I could not get much satisfaction anywhere. . . . I landed on St. George Island first a few hours, and then proceeded to St. Paul Island, and without any positive instructions from the Treasury Department, except in a general way. . . . . I was an Assistant Agent, but I was not aware of it till I got there. I discovered that I was to be the Assistant Agent after I came in contact with Mr. Otis. . . . . A Report which I made will explain, perhaps, the reasons why the associations with Mr. Otis were not altogether agreeable to me."

H. R., 50th Cong., 2nd Sess., Report No. 3883, p. 42.

Mr. T. F. Ryan

Thus Mr. T. F. Ryan, First Assistant Agent on St. George Island from 1885 to 1887, when asked whether he had any instructions from the Treasury Department, replied:—

"No, Sir; I had none. When I left, I had some idea of matters up there and asked the Secretary about instructions, and he asked me to write my own instructions. I did not do so. I went up there and found not a scratch of a pen anywhere except a record from day to day, merely when it rained and when the sun shone and the state of the thermometer and things of that kind, but as to the government of the people, there was nothing. You had to learn for yourself."

Ibid., p. 215.

Mr. W. Gavitt.

So, also, Mr. W. Gavitt, Assistant Treasury Agent in 1888 and 1889, states that he was sent to the islands without any instructions whatever from the Department.

It would appear, however, that in some cases the Chief Government Agent on the islands was expected to instruct the Assistant Agents, for Mr. G. R. Tingle states that he was provided with both written and verbal instructions from the Treasury Department. In giving evidence before the same Committee of Congress, the following

H. R., 50th Cong., 2nd Sess., Report No. 3883, pp. 274, 275.

passage throwing further light on this point occurs :—

"*Q.* Did you give Mr. Gavitt [the Assistant Agent on St. George Island] instructions when he entered upon his duties?—*A.* He was assigned by the Department to St. George Island, and I was ordered to place him there and instruct him in his duties. I instructed him as far as he was capable of receiving instructions, went ashore with him and showed him the books in the office, and how he was to keep them. I placed a copy of the Law and Executive orders in the office there, and gave him instructions as to the discharge of his duties."

The natives and the taking of seals on the islands have been under the control of the Company's agents throughout.

Whatever the theoretical relations may have been as between the Government officers and the natives, it is evident that the natives themselves, as well as the handling of the seals, have throughout been in practice actually under the control of the agents of the Company. The subjoined extracts have special bearing on the last-mentioned subject :—

Mr. H. W. Elliott, 1872–74.

Mr. H. W. Elliott says :—

H. R., 50th Cong., 2nd Sess., Report No. 3883, p. 138.

"The natives and the Company are jointly interested in getting the very best skins, and getting them as rapidly as possible. . . . On the morning of a killing day the Company's agent gets up at the break of day and goes out with his party."

And says, further :—

H. W. Elliott, in H. R., 44th Cong., 1st Sess, Report No. 623, p. 80.

"When the killing season opens the men get together, and the chief goes to the Company's agent early in the morning and asks if he is ready to go to work. The Company's agent says: 'Yes; in your judgment go ahead.'"

And again says :—

Ibid.

"The habit of the Company is to inform the chief or foreman of the natives, every morning during the working season, of their desire for a certain number and certain kind of skins. These men go to the natives, and arouse them from their slumbers."

Captain Bryant, 1876.

Captain Charles Bryant, who was on the Pribyloff Islands as a Special Agent, from 1870 to 1877, before the Congressional Committee in 1876, in answer to the question—

H. R., 44th Cong., 1st Sess., Report No. 623, p. 96.

"Who has the direction of the natives in their work, the agent of the Company?"

said :—

"No; their chiefs. In killing the seals the agent of the Company directs the chief, saying to him that he wants him to go ahead and kill seals as fast as he can.

. . . . When the seals are on the ground the agent of the Alaska Commercial Company stands by the herd while they are being killed, and, after the chiefs have selected such seals as they consider prime they ask the agent of the Company if there are any more in that lot which he wants. If he chooses any of the others, they kill them."

Mr. J. Moulton, 1877–85.

Mr. Jacob Moulton, Special Treasury Agent at the Seal Islands from 1877 to 1885, reports that—

"the agents of the Company have the killing in charge. The killing is done by the natives, and the agents have charge necessarily."

H. R., 50th Cong., 2nd Sess., No. 3883, p. 251.

Mr. Taylor, 1881.

Mr. W. B. Taylor was a Special Agent of the Treasury Department on St. George Island in 1881, and says of the natives :—

"These people are absolutely in their [the Company's] charge, that is, in regard to their care and comfort"

Ibid., p. 52.

Mr. Glidden, 1882–85.

Mr. H. A. Glidden, a Special Agent of the Treasury Department at the Pribyloff Islands from 1882 to 1885, in answer to the question—

"And then at the killing-ground who superintends the selection of those to be killed?"

H. R., 50th Cong., 2nd Sess., No. 3883, p. 20.

says :—

"They are there huddled up, and then they are separated, about fifty at a time—coralled as it were—and the Superintendent of that [the separating] is one of the employés of the Company."

H. W. Elliott, in H. R., 44th Cong., 1st Sess., Report No. 623, p. 20.

Mr. Clark, 1884–89

One of the witnesses quoted in the Case of the United States, Mr. H. N. Clark, gives the following evidence, from which it clearly appears that he, as a Company's officer, was personally in charge of the sealing and natives conducting it :—

"From 1884 to 1889, inclusive, I was in the employ of the Alaska Commercial Company of San Francisco, on St. George Island, Alaska, engaged through each sealing season as boss of a gang of seal-hunters, and in the winter excepting that of 1886 and 1887 as teacher and storekeeper on the island. My work as the leader of the sealing gang gave me as perfect opportunity as could be had for studying the habits and peculiarities of the seal and determining the best manner of caring for them."

United States' Case, p. 148; Appendix, vol. ii, pp. 158, 159.

The Company's agents exercised similar control of killing in 1892.

Mr. Macoun, also, reports that all work connected with the choice of hauling-grounds from

Appendix, vol. i, p. 152.

which seals should be driven, the driving of the seals to the killing-ground, and the selection there of those that were to be killed, was done by the agents of the Company, or the natives acting under their instructions, during the season of 1892, when he was on the islands.

CHAPTER XVI.

Management of the Pribyloff Islands by Russia and by the United States—(continued).

Inadequacy of Protection: Raids.

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, p. 174—

"Raids upon the rookeries, or the unlawful killing of seals on the islands by unauthorized persons, though injurious to seal life, have played no important part in the history of the rookeries, and the few thousand skins thus secured never affected the number of the seal herd to any extent."

(2.) United States' Case, pp. 174, 175—

"The 'raid theory,' therefore, may be dismissed as unworthy . . . . of serious consideration. . . . . If other raids had taken place besides these, the fact would have certainly been known on the islands."

(2.) United States' Case, p. 175—

"A further evidence of the infrequency of such marauding is further shown by the affidavit of Mr. Max Heilbronner, Secretary of the Alaska Commercial Company, as compiled from the records of said company, and the statement compiled by the Treasury Department from the reports of their agents during American occupation, there being but sixteen such invasions reported. If other raids had taken place besides these, the fact would have certainly have been seen on the breeding-grounds in the shape of dead carcasses of pups and other seals."

SUMMARY OF BRITISH REPLY.

The protection of the Pribyloff Islands against the operations of "raiders," unlawfully killing seals upon the islands, has been inadequate, if not wholly inefficient; and the consequent damage to seal life upon these islands has been very great.

The Reports of Agents, whether those of the Government or the Company leasing the islands, are practically unanimous to this effect. Though vessels were known, at least as early as 1873, to be engaged in raids, no Government vessel was sent to protect the islands from raids till 1877; and, thereafter, as lately as 1888, it is shown that a single vessel was charged with the whole patrol duty in Behring Sea, and that this vessel spent most of the time hundreds of miles to the north of the Pribyloff Islands, looking after the whaling interests.

The Pribyloff Islands have throughout been utterly defenceless, and Captain Abbey, U.S.R.M., reported in 1886 that twenty men might carry away the whole catch of sealskins from the islands, and similar evidence exists of the inadequate protection of the rookeries up to the year 1892.

The defective knowledge as to the number and character of such "raids" possessed by the Company leasing the islands and by the Government of the United States, in itself affords proof of the insufficiency of protection.

In the Case of the United States, it is attempted to minimize the frequency of raids with their attendant consequences on the Pribyloff Islands. Statements are further quoted in support of the assertions that raiding must be so difficult, and the chances of detection so many, that it is necessarily very seldom practised.

The contention thus advanced forms part of a general defence of the methods employed on the Pribyloff Islands, which is made the preliminary to the assertion that the killing of seals at sea is the sole cause of the decrease in numbers observed on the islands.

All authorities concur in characterizing protection of Pribyloff Islands as inefficient.

It requires, however, only a reference to the various official Reports of the United States' Government to find, that however diverse the opinions expressed by those who have held official positions on the Pribyloff Islands, whether under the Government or under the Company, they are almost completely in accord in stating that the measures taken to protect the islands have been insufficient from first to last. In a large proportion of these Reports, and in evidence given at various times, this insufficiency of protection has in fact been a chief subject of complaint. To substantiate this statement a few particulars will be given, and some specific complaints from among many cited.

Early instances of successful raiding under United States' management.

The excessive slaughter of seals on the Pribyloff Islands by men who were virtually raiders in 1868 is elsewhere alluded to. Numerous vessels are known to have engaged in raiding these islands as early as 1873, some years after the date at which, according to the United States' Case, efficient possession and control of the islands had become assured.

United States' Case, p. 133 *et seq.*

Mr. H. W. Elliott may be quoted as authority on this point, and to establish the fact that not until 1877, and then only as the result of his own persistent endeavours to that end during four years, was a revenue-cutter detailed for the purpose of giving a certain measure of protection to the rookeries as against these raiders.

Difficulty in inducing United States' Government to send revenue-cutter for protection.

Mr. Elliott's statements are contained in his official Report, published by the Government, and are as follows:—

United States' Census Report, pp. 167, 168.

"Early in 1873 it became well known on the Pacific coast, that the officers of the law on the seal islands had no means of enforcing the Regulations protecting the seal life on the same or in waters adjacent; hence, a number of small craft, fitted out at San Francisco and contiguous

ports, which cleared for the North-west coast and the Aleutian Islands on 'fishing ventures;' but, in reality, these vessels proceeded directly to the waters and rocks adjacent to the seal islands, where, in plain sight of the village on either islet, they shot the swimming seals with assumed indifference and great affectation of legality!

No such protection till 1877.

"In order, therefore, that this plain violation of law and its disastrous consequences should be effectually punished, and evaded, I published, and personally urged in 1874-77 the urgent need and great propriety of enabling the responsible Agents of the Government on the Pribyloff Islands, to enforce the law as well physically as it could be done theoretically; and pointed clearly then to the advantage and effect which a revenue marine cutter would have, employed for this purpose. By repeated and untiring appearance before the Committee on Appropriations in the House and Senate, I finally secured the legal authority and the money for the object in view. And the late Captain Bailey, in the 'Richard Rush,' made the first cruize in the season of 1877, that had been properly ordered and sustained by the Government toward the direct protection of the seal islands, and its valuable property thereon since 1869."

Agent W. B. Taylor on powerlessness to protect in 1881.

Mr. W. B. Taylor, Assistant Government Agent on the Pribyloff Islands in 1881, says:—

"These vessels will take occasion to hang around the islands, and when there is a heavy fog to go on the rookeries very often. . . . . The Government Agents there are utterly powerless to prevent the killing of seal, or to protect them in any way." H. R., 50th Cong., 2nd Sess., Report No. 3883. pp. 54-58.

And, further, in speaking of the single revenue-cutter, says:—

"They never happen to be there when needed, and as far as their rendering any service whatever is concerned, they were practically useless so far as the Seal Islands were concerned. That has been the experience, I believe, of all who have been there."

The same gentleman further says:—

"A man that was desperate enough to take chances, and knew the situation, I do not think it would be at all a difficult job to load a schooner. If I wanted to make an outlaw of myself I could take all the skins I wanted, and not have any trouble at all." Ibid., p. 64.

Mr. Louis Kimmel, Assistant Treasury Agent on St. George Island from May 1882 to August 1883, after describing a raid, says:—

"It [seal life] ought to be more protected by having revenue-cutters. At that time there was only one revenue-cutter, only there once a-year." Ibid., p. 271.

Agent H. A. Glidden complains of raids in 1882–85.

H. R., 50th Cong., 2nd Sess., Report No. 3883, pp. 26–28.

Mr. H. A. Glidden, Government Agent in charge of the Pribyloff Islands from 1882 to 1885, in giving evidence before the Congressional Committee on the Fur-seal Fisheries of Alaska, states that to watch marauders, *i.e.*, trading vessels buying or stealing skins on the mainland or coast along the Aleutian Islands, was more trouble than anything else. Glidden further says that no revenue-cutter was kept at the islands in these years, though in every Report he made he recommended that this should be done.

Agent Wardman powerless in 1883.

Ibid., pp. 34, 35, 38, 39.

Mr. Wardman, Assistant Government Agent on St. George, in 1883, was absolutely without any means of dealing with or seizing a sealing-vessel boarded by him when at anchor there. He further speaks directly in his evidence of the inefficiency of the protection, and the fact that the revenue-cutter was often away from the islands at the very time she was required there.

Agent Ryan on inefficient protection in 1887.

Ibid., pp. 211, 212

Mr. T. F. Ryan, Assistant Government Agent on St. George Island from 1885 to 1887, states that he had a great deal of trouble in protecting the rookeries from parties landing on them. He complains of the inefficiency of the service of protection by the revenue-cutters, but believes that one vessel properly managed would serve to protect the islands.

Mr. T. Morgan, agent of the Company, 1888.

Ibid., p. 64.

Mr. T. F. Morgan, an agent of the Alaska Commercial Company, with long experience of the Pribyloff Islands, in giving evidence before the Committee of Congress in 1888, speaks of raids upon the rookeries in several seasons, and states that by taking advantage of circumstances it would not be difficult to load a schooner with skins there.

Mr. G. A. Williams, manager of the Company, 1888.

Ibid., p 106

Mr. G. A. Williams, one of the managers of the Alaska Commercial Company, also, in 1888, states that the protection accorded to the Pribyloff Islands was insufficient; that there had been increased depredations annually upon the rookeries; and that the revenue-cutter was frequently absent during the greater part of the sealing season.

Agent G. R. Tingle, 1885–89

Ibid., p. 164

Mr. G. R. Tingle, Government Agent on the Pribyloff Islands from 1885 to 1889, before the Committee of Congress, in 1888, said:—

"When I took charge of the islands they were practically without protection. The Government had one cutter

to cruize in Bering Sea and the Arctic Ocean. She merely called at the fur-seal islands, took a look at us, cruized round us and then went on up to the Arctic, remaining there all summer and then came down in the fall, calling at the seal islands, took another look at us and then left for San Francisco."

Captain Abbey on inefficient protection.

Captain Charles A. Abbey was, in 1886, in command of the United States' revenue-cutter "Corwin." He was engaged that year in protecting the seal rookeries, and says:—

"There is no reason why the catch at the seal islands cannot be stolen any day if anybody is disposed to. I believe I could take a vessel with twenty good men and go there and steal the whole catch and go away with it. There is more than a million dollars' worth of seal-skins at the mercy of any marauder, and has been for years."

H. R., 50th Cong., 2nd Sess., Report No. 3883, pp. 248, 249.

Mr. W. Palmer 1890.

In a paper read before the Biological Society in Washington, Mr. W. Palmer, as the result of his investigations in 1890 on the Pribyloff Islands, speaks as follows regarding the inefficiency of the protection accorded to these islands:—

"Sealers have no doubt about the fate that would be their lot if caught poaching on the Commander Islands, or within 3 miles of their shores, and accordingly have given them a wide berth, but they have heretofore done as they pleased about the Pribyloff Islands, and even on the rookeries. In the absence of the revenue-cutters the islands are utterly defenceless, and liable at any time to be raided."

"Forest and Stream," October 29, 1891

Agent A. W. Lavender in 1890.

In an official Report, dated the 24th October, 1890, and written from St. George Island, Assistant Agent A. W. Lavender writes as follows respecting the inadequate means available for protecting the rookeries:—

"I have again to request you to do your best to obtain arms and ammunition for these islands, and hope that you will be able to secure them, for without them the rookeries cannot be protected in a proper manner. The old rifles that answered for the protection of the rookeries belong to the natives, and are of but little use. In addition to the five rifles owned by the natives, the Company has found small Colt's rifles and one large Sharp's, with very little ammunition for any of them."

British Case, Appendix, vol. iii. United States No. 2 (1891)," p. 50. United States' Senate, 51st Cong., 2nd Sess., Ex. Doc. 49, p. 33.

Remarks on inadequate protection by British Commissioners.

After quoting much evidence respecting raids, the British Commissioners write:—

"It will thus be seen that raiding on the Pribyloff Islands has been carried on persistently at least since 1868, and that from that date the authorities have known

British Commissioners' Report, paras., 761, 763

of the raids, and from the earliest time urgently demanded precautions in prevention. . . . . In short, under present regulations and arrangements, there is no difficulty or danger whatever to vessels raiding along shore any night, or in any of the frequent fogs at several of the best rookeries, except when a revenue-cutter chances to be close by, an occasional occurrence well known to every seal-raiding schooner."

The British Commissioners add:—

British Commissioners' Report, para. 765.

"It may be pointed out that in no case yet has it been shown or proved that any British vessel ever engaged in raiding on the Pribyloff Islands."

Great injury caused by raids.

They further allude to the very injurious results of raiding, writing:—

Ibid., para. 762.

"It is by far the most destructive form of sealing, combining all the disadvantages and none of the advantages of the other forms. The killing is chiefly of breeding females, as the raiders cannot penetrate far enough inland to obtain the young bachelors or immature female seals. Thus, the skins they obtain are those of females, which are either still with pups or are suckling their young. Moreover, the process implies disturbance of the breeding rookeries, the scaring of the seals during their breeding time, male, female, and young, and the stampeding of whole rookeries, whereby, without doubt, there ensues that great killing of helpless pups which we have already reported we observed in certain rookeries."

See also United States' Case, Appendix, vol. ii, p. 217.

Absence of proper precautions in 1892.

Appendix, vol. i, pp. 153, 154.

That the protection from raids has not been materially improved even in 1892 is shown by the fact mentioned by Mr. Macoun, that there were no guards stationed at rookeries on St. Paul Island except at North-east Point, and that after the middle of August the telephone line connecting this place with the village was continuously out of order. The only rookery on St. George Island on which there was a guard was Zapadnie, and there the guard consisted of an Aleut man and a boy.

Two lists of raids in United States' Case do not correspond, and both are incomplete.

United States' Case, Appendix, vol. i, p. 519; and Appendix, vol. ii, p. 29.

The statistics furnished in the Case of the United States on this subject comprise lists compiled by the United States' Treasury Department and by Mr. [illegible] Meilbronner, Secretary of the Alaska Commercial Company. It so happens, however, that these lists in themselves afford an excellent index of the exceedingly imperfect knowledge of both the Government and the Company as to the actual frequency of raids upon the islands. The Treasury Department list records eleven raids only, between 1874 and

1889, both years inclusive; while the Company's list shows no more than six raids in the same period, and one of these is not enumerated in the Treasury list. The list of detected raids here subjoined shows about thirty in the same years, of which fifteen are recorded in various official Reports to the United States' Government.

The following list, however, merely includes known raids since 1874:—

List of actually recorded raids from 1874 to 1891.

1874.—Raid of "Cygnet" on Otter Island, 30th August, 1874.—(Wm. J. McIntyre, H. R., Ex. Doc. No. 83, 44th Congress, 1st Session, p. 129.)

Raid of "Cygnet" on St. George Island, 1st September, 1874.—(Wm. J. McIntyre, H. R., Ex. Doc. No. 83, 44th Congress, 1st Session, p. 125.)

1875.—"San Diego" raided Otter Island in 1875 and took 1,600 skins.—(United States' Case, vol. i, p. 519.)

"Cygnet" raided St. George Island, 1875.—(Report of British Commissioners.)

1876.—"Cygnet" and "Ocean Spray" raided Otter Island 21st June, 1876.—(Report of British Commissioners.)

1877.—In 1877 the "Industry" is recorded to have touched at St. George Island for the purpose of taking seals. (Report upon Alaska and its people. Bailey, p. 13.)

1880.—Great East Rookery, St. George Island, raided 1880.—(Webster in Report of British Commissioners, paragraph 742.)

1881.—Otter Island raided between April and August 1881. [Taylor reached island in April and left in August.] —(W. B. Taylor in H. R. Report No. 3883, 50th Congress, 2nd Session, pp. 54, 109.)

St. George Island raided the 1st September, 1881.—(George Wardman in H. R. Report No. 3883, 50th Congress, 1st Session, p. 39.)

"Otter" raided St. George Island in October 1881.—(Appendix to Case of the United States, vol. i, p. 519, and vol. ii, p. 29.)

1882.—East Rookery, St. George, raided in 1882.—(Louis Kimmel, H. R. Report No. 3883, 50th Congress, 2nd Session, p. 271.)

Captain Folger says, in his affidavit, that the schooner he commanded and another anchored off St. Paul Island from June until September, running in and raiding the rookeries whenever the weather permitted. These vessels were probably those referred to by Captain Miner when he says: "I have frequently heard of raids being made on the Pribyloff Islands. In 1881 or 1882 two schooners

Appendix, vol. ii. p. 47.

Ibid., p. 73

anchored to the northward of St. Paul for nearly the whole summer. They were the "Otter" and "Alexander," vessels owned by Liebes and Co. The captains of their vessels told me so themselves.

1883.—Schooner boarded off St. George Island the 10th October, 1883; 300 skins were on board.—(George Wardman, H. R. Report No. 3883, 50th Congress, 2nd Session, p. 34.

Vessel loaded with seals captured at St. George Island while the crew were ashore.—(Glidden [1882-1884], H. R. Report No. 3883, 50th Congress, 2nd Session, p. 28.)

1884.—"Adele" seized in 1884, when raiding a rookery.—(United States' Case, vol. ii, p. 519.)

Raid on Zapadnie Rookery, St. George Island, the 10th October, 1884.—(Appendix to Case of United States vol. ii p. 29.)

1885.—In 1885, Webster found that men had camped ashore at St. George Island.—(Report of British Behring Sea Commissioners, paragraph 751.)

June 1885, 500 seals were killed before vessel detected. —(Appendix to Case of the United States, vol. i, p. 519.)

In 1885, three schooners were captured at Otter Island: one, the "Adele," by Webster, Lieut. Lutze, and two men. —(Report of British Behring Sea Commissioners, paragraph 751.)

Starry Arteel Rookery, St. George Island, raided, and 600 seals killed "several years ago."—(Morgan, H. R. Report No. 5883, 50th Congress, 2nd Session, p. 64.)

20th July, 1885, 600 or 700 seals were killed on St. George Island.—(Appendix to the Case of the United States, vol. i, p. 519.)

20th July, 1885, 500 pups and 500 females killed on St. George Island.—(Appendix to the Case of the United States, vol. ii, p. 29.) [This probably refers to same raid as two first preceding references.]

Raid on St. George Island in 1885 or 1886; 112 sealskins found by T. F. Ryan.—(H. R. Report No. 3883, 50th Congress, 2nd Session, p. 212

At Starry Arteel, a raid was made the 22nd July, 1885; 120 seals and 200 pups were killed.—(Appendix to Case of United States, vol. ii, p. 29.)

1886.—Attempted raid on St. George Island 18[illegible]6.—(Tingle in H. R. Report No. 3883, 50th Congress, 2nd Session, p. 17[illegible])

In 1886, Morgan found carcasses of 800 female seals on shore.—(Report of British Commissioners, paragraph 752.)

Raid on St. George Island, 8th August, 1886.—(Appendix to Case of the United States, vol. i, p. 519.)

"San Diego" captured in 1886 with 574 skins on board, as well as clubs, pup skins, &c., proving raid.—(Tingle in H. R. Report No. 3883, 50th Congress, 2nd Session, p. 175.)

"Look-Out" raided Seal Islands in 1886 and 1887.—(Report of British Commisssioners, paragraph 752.)

Raid in autumn of 1886 or 1887 [not the one noted above].—(Morgan in H. R. Report No. 3883, 50th Congress, 2nd Session, p. 90.)

1887.—In 1887, schooner was seen shooting seals in water North-east Point, 18th, 21st and 25th July.—(Report of British Commissioners, paragraph 753.)

1887.—"Angel Dolly" captured near Otter Island the 28th July, 1887.—(H. R. Report No. 3883, 50th Congress, 2nd Session, p. 332.)

Steam-schooner shot at from North-east Point, 4th August, 1887. Seized by "Rush," and proved to be "Kate and Anna."—(Report of British Commissioners, paragraph 753.)

Starry Arteel Rookery, St. George Island, raided in August 1887. Signs found by Webster.—(Report of British Commissioners, paragraph 753.)

Raid on Reef Rookeries, St. Paul Island, 1887. 4,300 seals taken.—(Tingle in H. R. Report No. 3883, 50th Congress, 2nd Session, p. 166.)

In 1887, Webster heard boats shooting close to shore.—(Report of British Commissioners, paragraph 753.)

"Angel Dolly" raided St. George Island in July 1887.—(Appendix to Case of the United States, vol. i, p. 519.)

1888.—In 1888, schooner anchored at South-west Bay and sent boats ashore.—(Report of British Commissioners, paragraph 754. United States' Case, vol. i, p. 520.)

1889.—In 1889 the "Angel Dolly," "Allie Algar," and other vessels raided St. George.—(Report of British Commissioners, paragraph 755.)

Raid on St. George Island in September 1889.—(Appendix to Case of the United States, vol. i, p. 520, and vol. ii, p. 29.)

The "Edward Webster" raid on St. George Island in 1889. "The captain told me of this himself." Miner's evidence, Appendix, vol. ii, p. 72.

1890.—Vessel reported killing seals near shore in August 1890.—(Report of British Commissioners, paragraph 756. United States' Case, vol i, p. 520.)

September 15, 1890.—Six boats' crews landed at Zapadnie, and killed about 180 seals.—(Appendix to Case of the United States, vol. i, p. 520.)

November 1890.—"Adele" raided seal rookeries.—(Appendix to Case of the United States, vol. i, p. 520.)

Miner's evidence, Appendix, vol. ii, p. 73.

In 1890 in September the "G. R. White" made a raid on the islands, and from what I was told by the men on board of her nothing was known of it on the islands.*

Several raids or attempted raids in St. George in 1890. —(Report of British Commissioners, p. 757.)

"Challenge" raided rookery on St. George Island 17th November, 1891.—(Appendix to Case of the United States, vol. i, p. 520.)

Appendix, pp. 183, 185.

"Borealis" raided rookeries on St. Paul 27th November, 1891, and evidence is forthcoming from men who took part in the raids to show that at the time a cutter was anchored at the village her lights in sight. The raid was made upon South-west Bay.—(Appendix to Case of the United States, vol. i, p. 520.)

Number of undetected raids cannot be estimated.

It is hard to form an estimate of the number of undetected raids; but the facts previously given with those now mentioned indicate that it must have been very great.

Connection of H. Liebes and Co., with raids and with North American Commercial Company.

It is further noteworthy that the firm of H. Liebes and Co., of San Francisco, of which Mr. Isaac Liebes, the present President of the North American Commercial Company, is a member, have owned two vessels, the "Otter" and the "Alexander," which are well known to have persistently raided the rookeries on both the Pribyloff and Commander Islands.

* As to raids of "George R. White," "Daniel Webster," "Mollie Adams," "Adele," and "Look-Out," see affidavits of C. J. Kelly, p. 169; Wm. Petit, p. 171; W E. Baker, p. 174; C. N. Cox, p. 177; Theo. Magnesen, p. 179, in British Case, Appendix, vol. iii. "United States No. 3 (1892)."

CHAPTER XVII.

Management of the Pribyloff Islands by Russia and by the United States—(continued).

Condition of the Natives.

THE UNITED STATES' CONTENTIONS.

(1.) United States' Case, pp. 140, 141—

"The improvement in the condition of the natives of the Pribyloff Islands is one of the marked features of the benefit which has resulted from the management of these islands under the system adopted in 1870 by the Congress of the United States."

(2.) United States' Case, p. 141—

"When the United States assumed control of the Territory of Alaska the condition of these natives was wretched in the extreme, the Russian-American Company having regard to their welfare, and forcing them into practical slavery."

(3.) United States' Case, pp. 144, 145—

". . . . The management of the Pribilof Islands by the United States has raised the inhabitants in a few years from a state of ignorance, wretchedness, and semi-barbarism, which seventy years of the Russian Company's occupation had failed to alleviate, to a condition of liberty and civilization, which Europe and America need not feel ashamed to find among their citizens.

"The civil government of the islands is provided for by sections 1973–1976 of the Revised Statutes of the United States, under which the Agent and his assistants are practically the Governors of the islands. They have the entire control of the natives, protect them from the impositions of the lessees and agents, if such are attempted, and see that the supplies required by law for their sustenance are provided."

SUMMARY OF BRITISH REPLY.

The people now resident upon the Pribyloff Islands are not natives properly so-called, but Aleuts, or the descendants of Aleuts, imported for the purpose of killing seals and curing the skins. The islands were uninhabited when discovered by the Russians; and the number of so-called natives is now so small that provision may easily be made for their support, irrespective of any questions relating to the seal industry.

The condition of the native inhabitants of the Pribyloff Islands is, that is, by no means so satisfactory as the statements given prominence to in the Case of the United States would indicate. Official Reports show that their [illegible] improvement [illegible] and their sanitary condition bad.

The treatment accorded to the natives by the Company has [illegible] the Government, in the interest of the natives, has been vantage [illegible] ineffective.

Arguments in United States Case based on improvement in condition of natives.

Special prominence is given in the Case of the United States to statements respecting the improved condition of the natives of the Pribyloff Islands, resulting from the beneficent efforts and conduct of the Government Agents, and those of the Company holding the lease of the islands; and in addition to statements of the character cited above, Messrs. Bryant, McIntyre, and Falconer are further cited to present an extremely favourable picture of the condition and surroundings of the Aleuts living upon the islands. We are, in fact, it would appear, asked to consider the commercial monopoly endeavoured to be sustained by the United States as a philanthropic enterprise, largely justified by an improvement alleged to have been brought about by its means in respect to the so-called natives of the Pribyloff Islands.

United States' Case, pp. 142–144.

It is submitted that all the statements above summarized are wholly irrelevant to any question with which the Arbitration is conversant; but as the Government of the United States have imported them into their Case, it is not desired to leave them entirely unnoticed.

Facts disclosed by official Reports contradict the contentions in United States' Case.

The notes and quotations from official Reports made to the United States' Government, and from other published sources in connection with the general history and nature of the management of the Pribyloff Islands since their cession by Russia, put a very different aspect on the state of affairs there from that set forth in the United States' Case.

In addition to incidental remarks already made in connection with other branches of the subject, a few notes specifically referring to the circumstances and treatment of the natives may here be added.

General Davis on condition of natives in 1870.

Major-General Jefferson C. Davis, Commander of the District of Alaska, in his official Report, dated the 20th August, 1870, addressed to the United States' Secretary of War, writes:—

Report of Brevet Major-General Commanding Department of Alaska to Secretary of War, August 20, 1870.

"The natives are peaceful, honest, and capable of transacting ordinary business quite well, and would doubtless improve themselves if they had a fair chance; but their present complete enslavement and robbery, by an unscrupulous ring of speculators, will ever prevent such progress."

Dr. W. H. Dall in 1874.

In August 1874 Dr. W. H. Dall, then in charge of hydrographic surveys in Alaska, in a letter to Messrs. Elliott and Maynard, Govern-

ment Commissioners to the Pribyloff Islands, writes:—

"The Russians left these people with their self-reliance enfeebled, but their intelligence and morals elevated to some extent above their original condition. We have done nothing to sustain them in this position, nor to cultivate their self-reliance." Elliott's "Report on the Condition of Affairs in Alaska," 1875, p. 234.

Dr. Dall also states in this letter, that the Aleut natives were absolutely dependent upon the Company leasing the Pribyloff Islands for sea-lion skins with which to make their canoes; and that, contrary to the Russian practice, this Company sold such skins to the natives, and restricted the sale to such of the natives as brought furs to them for sale. He adds:— Ibid., p. 232.

"The description of men who gain their livelihood as fur-traders are, with rare exceptions, unfit to be trusted with absolute power over unresisting natives, notwithstanding the possible high character of the distant heads of the Company who employ them." Ibid., p. 234

He further adds:— Absence of law or redress.

"There is absolutely no law, no means of protection, no redress for injury for any citizen of the United States, to say nothing of natives. . . . . Suppose some act of gross injustice should occur, in what way would the unfortunate Aleut make his troubles known, if his long experience under the Russians, and disappointed hopes under the various visits of United States' officials, had not taught him that the best way was to bear it in silence?" Ibid., p. 233.

In respect to the absence of law and any prospect of redress at this time, Mr. Elliott fully concurs with Dr. Dall, though contesting some of his other statements. Ibid., p. 2 7.

Dr. Dall further writes:—

"There are no grounds for stating, nor is it my opinion, that the present Company has abused its position more than any other would do in the same case; this, however, is not the question at issue, but whether it is consistent with the honour of the Government and with its duty toward a people who occupy the position of wards of the United States, to leave them in a condition where the grossest tyranny is possible, and where gradual degeneration and relapse into barbarism is certain." Ibid., p. 233.

Lieutenant W. Maynard, U.S.N., in his Report transmitted in 1875, alludes to one of the matters referred to by Dr. Dall as follows:— Lieutenant Maynard, 1875.

"As the Special Agents of the Treasury Department, who are the only representatives of the Government at the islands, have not been invested as yet with any governing H. R., 44th Cong., 1st Sess., Ex. Doc. 43, p. 7.

power, it seems necessary that some means should be provided for securing to all equal protection in the rights of persons and property. This could be accomplished for the present, at least, by giving them authority somewhat similar to that of a Justice of the Peace, making them responsible to the Secretary of the Treasury for the proper performance of that duty, as they are for that of those with which they are now charged."

Agent W. B. Taylor, 1881.

Mr. W. B. Taylor, who was a Special Agent of the Treasury Department on St. George Island in 1881, says of the condition of the native people at that time:—

H. R., 50th Cong., 2nd Sess., Report No. 3883, p. 42.

"When I landed on St. Paul Island I found that the people were in a very deplorable condition—made so by the frequent and constant use of what is known as quass, a beverage which they brew when they are not molested by the Special Agent of the Treasury. I found that at least one-third the people were in a condition which made it impossible to do what was expected of them by the Company; in other words, there are so many men on the island, and their services are absolutely necessary to carry on all the business and do the seal work; but one-third of them were incapacitated for the reason I have stated. And I charged them, and I charge now, that the Agent who had control over them was directly responsible for it."

Agent Murray, 1890.

Assistant Agent Murray, writing in his Report of St. George Island as late as 1890, says:—

British Case, Appendix, vol. iii. "United States No. 2 (1891)," p. 19.

United States' Senate, 51st Cong., 2nd Sess., Ex. Doc. 49, p. 7.

"It will be an impossibility, however, to do much towards establishing a sanitary system of value until we have better water and a more abundant supply than is possible under existing conditions.

"The present supply of water for domestic purposes is obtained from a well into which the drainage of half the village finds its way, and the wonder to me is that the people are not constantly sick while they have to use such drinking water. There is a nice fresh-water lake within 2,000 feet of the village, and fully 50 feet higher, from which a constant and never-failing supply of good water can be taken if you can have 2,000 feet of 2-inch pipe and the necessary hydrant and fixings sent here.

"A drain is the next essential to success, and one of 700 feet in length can be dug easily, and will suffice to carry all the dirt and offal of the village into the sea. It will be necessary to have 700 feet of 12-inch drain-pipe.

"The total absence of water-closets on this island is a disgrace, and is beyond all question the cause of more immorality, disease, and death than all other things combined. That such a state of things has been allowed to exist for twenty years is a disgrace to our civilization, and I do hope you will insist on the present lessees or on the Department to have it altered at once.

"The subject is so abominable I dare not write it in a public Report.

"It is absolutely necessary, too, that at least six of the dwelling-houses be enlarged, as the families now occupying them have not room to live as human beings should. It may be true, as many assert, that under Russian rule the natives were not housed one-half so well as they are now; but such arguments are of no avail in a country like ours. When a family of seven persons, of all ages and sexes, are packed in a sleeping apartment measuring 10 by 10 feet they are not treated right, nor does our Government intend to have such things existing where it has jurisdiction.

"The dwelling-houses are badly in need of repairs, and the attention of the local agent, Mr. Webster, has been called to their condition; but as he is to leave the island this year, it may be necessary for you to mention it to the General Manager of the North American Commercial Company."

Remarks on origin and treatment of so-called natives in British Commissioners' Report.

The British Commissioners in their Report do not enter at any great length into the question of the condition and treatment of the so-called natives on the Pribyloff Islands. They point out, however, that these people are not in reality "natives" of the islands, but descendants of Aleuts from the Aleutian Islands, brought thither by the Russians, mixed with recent importations from the same islands. They allude also to the fact that the whole number of these people is so insignificant (about 300) as to render the question of the cost and manner of providing for their support one which can scarcely be allowed a place in the discussion of the general questions relating to the condition of the natives as a whole, or to the measures appropriate for the protection of the fur-seals. They also note that, although the material condition of these people has been improved by the industry of taking seals on these islands, it is difficult to understand on what grounds—

"the special advantages of a material kind afforded to these particular people as distinguished from others of the same race, and partly at the expense of interference with the rights of hunting of those inhabiting the Aleutian Islands, can be advanced as a valid argument in favour of the perpetuation of a commercial monopoly of fur-sealing."

British Commissioners' Report, para. 723

It is still further stated that—

"it is also clear that the so-called natives of the islands, though under ordinary circumstances provided for in certain respects by the lessees according to legal

Ibid., para. 724.

British Commissioners' Report, para. 725.

arrangement, have in past times not always been among the first objects of their solicitude. . . . . A single instance, to which it happened that our attention was drawn, may be cited for the purpose of showing that the natives, even in recent years, received no more than strictly 'commercial' treatment."

The reference here made is to the entirely inadequate allowance of coal given to the natives up to the year 1891, on account of which, and in the absence of other fuel, the people found it necessary to employ their earnings to buy additional coal from the Company at its own price, which was fixed at 30 dollars (6*l.*) per ton.

CHAPTER XVIII.

The Seal-skin Industry.

The United States' Contentions.

(1.) United States' Case, p. 266—

"Prior to 1870 all the fur-seal skins, save a few thousand, were marketed and sold in China. . . . . A few skins however were purchased in England."

(2.) United States' Case, p. 267—

"It was not until the lease of the Pribilof Islands to the Alaska Commercial Company in 1870, and through the united efforts of that Company with C. M. Lampson and Co. that the seal-skin industry received the impetus which has built it up to its present condition."

(3.) United States' Case, p. 268—

"The destruction of the Alaskan herd means practically the annihilation of the seal-skin industry of the world. Therefore, the extent and value of this industry, the consequent loss in case pelagic sealing is not prohibited, ... are matters for consideration."

(4.) United States' Case, pp. 274, 275—

"It is necessary that the supply should be constant and regular, otherwise there is great danger of loss to the buyers or sellers through fluctuation in prices, and the business of buying and selling become speculative . . . . It is therefore evident that even in case open-sea sealing could be carried on without insuring the destruction of the herd, the results would demoralize and practically ruin the seal-skin industry, now so firmly established."

(5.) United States' Case, p. 281—

"It is very questionable, however, whether there is any real investment in Canada in pelagic sealing."

(6.) United States' Case, p. 298—

"That the investment of these adventurers in pelagic sealing is speculative, generally unprofitable, and, when compared with the seal-skin industry of Great Britain, France, and the United States, which is dependent upon this seal herd, very insignificant; and that the profits, if any, resulting from pelagic sealing are out of all proportion to the destruction that it produces."

Summary of British Reply.

The fur-seal business, prior to 1870, constituted a considerable part of the fur trade of Great Britain.

The existence of pelagic sealing does not necessarily occasion an irregular supply of skins. The principal fur merchants are practically unanimous in opposing the suppression of pelagic sealing.

The capital so invested by Canada in the sealing industry exceeds the capital permanently invested by any other country.

The propositions sought to be established in the Chapter of the United States' Case from

which the above citations are taken would appear to be the following:—

I. That there is a distinctive and separate fur seal-skin industry, and that this industry, so far as Great Britain is concerned, was prior to 1870 insignificant, and was in that year established through the united efforts of the Alaska Commercial Company and their agents in London.

II. That pelagic sealing produces an irregular supply which is ruinous to the industry.

III. That there is little capital invested in Canada in pelagic sealing; and that, compared with the fur-seal industries of Great Britain, France, and the United States, the Canadian industry is scarcely worth consideration.

No separate industry except at sources of supply.

As regards the first proposition, no doubt the persons actually engaged in capturing the seals at the sources of supply form a separate and distinctive industry, more directly interested than all others in the questions at issue; but, except in this sense, it is submitted that neither in Great Britain, nor in the United States, nor in other countries, is there what can properly be called a separate and distinct fur-seal industry.

The circumstances in Great Britain will suffice to demonstrate that this statement is correct.

United States' Case, p. 272.

It is stated in the United States' Case that there are employed in the fur-seal skin industry in Great Britain from 2,000 to 3,000 persons, who would be compelled to learn other trades in case the industry were to fail. If such failure were possible, it is denied that any such result would follow.

Including brokers, dyers, dressers, merchants, furriers, wholesale and retail, and their respective employés, there are at least the number of persons above mentioned engaged in the fur-seal skin business; but they are not so occupied exclusively, nor are they absolutely dependent upon the fur-seal skin business. But a very small part of the above classes are at any time entirely occupied with or dependent upon the business connected with fur-seal skins, all of them being concerned at the same time with furs and skins of other descriptions.

Appendix, vol. ii, p. 248

The fur-seal skin business forms, no doubt, a considerable part, but still only a part, of the whole fur trade of Great Britain. Its relative position to the whole fur trade may be roughly

Seal-skin business part of general fur trade.

gauged by comparing the total sums realized by sales of all raw furs and skins in London with those realized by fur-seals. It is estimated that furs of all descriptions sold in Great Britain realize annually over 1,200,000*l.*, and the total sales of fur-seal skins (taking for example 1887) amount to about 450,000*l.*, so that the seal-skin industry composes in point of value less than 38 per cent. of the total fur trade of Great Britain. Of this 450,000*l.*, at least 170,000*l.* represents seal-skins derived from other sources of supply than the Pribyloff Islands, so that it will be seen that the value of the seal-skins coming from the Pribyloff Islands does not exceed 24 per cent. of the whole fur trade of Great Britain.

United States' Case, Appendix, vol. ii, p. 561.

As regards the amount of the total labour bill to be apportioned to seal-skins, it should be remembered that other furs, being for the most part cheaper, are more numerous than seal-skins proportionately to their respective prices, and therefore would, as a matter of fact, require more hands to deal with them.

Capital for most part not sunk in business.

It should also be borne in mind, with reference to the large capital engaged in the business, that so far as brokers, merchants, and wholesale and retail furriers and dressers are concerned, their capital is not in any way sunk in the business, but is only temporarily embarked in it from year to year, and is not permanently invested, as the capital of the Canadian schooner owners is invested.

Should the seal-skin trade diminish, either through change in fashion or scarcity of supply, other furs would no doubt be made fashionable in their stead, and furriers would at once, without loss or difficulty, transfer their capital to them.

This is also true, to a lesser degree, of the dyers engaged in the business, whose plant would, to some extent, be available, provided the new skin made fashionable was one which required dyeing.

It is, therefore, obvious that apart from those engaged in the actual capture, there cannot be said to be a separate and distinct fur-seal industry in the sense suggested by the United States, but that the trade in seal-skins forms in truth but one portion of a larger and more important industry.

The seal-skin business existed in England prior to 1870.

The contention, that the seal-skin business in Great Britain owes its existence to the efforts

of the Alaska Commercial Company and their London agents, is no doubt advanced by the United States in order to base upon it a claim to priority of consideration for the United States' interest.

The contention is, however, it is submitted, quite erroneous, and is disproved at once by a reference to the Tables given in the Appendix, which are summarized hereunder, clearly showing that the seal-skin industry has, at all events from an early date in the present century, formed a most important portion of the London fur trade.

Appendix, vol. ii, p. 254.

Year	Annual Total of Quantities offered for Sale in London.	Annual Average of Quantities on Basis of Ten Years.
1827	77,120	
1828	74,946	
1829	72,691	
1830	56,185	
1831	36,740	48,371·5
1832	40,421	
1833	36,239	
1834	32,223	
1835	27,168	
1836	29,982	
1837	32,497	
1838	37,137	
1839	28,727	
1840	36,533	
1841	29,053	29,155·2
1842	26,682	
1843	27,946	
1844	26,548	
1845	24,260	
1846	22,169	
1847	20,405	
1848	24,762	
1849	32,313	
1850	30,471	
1851	27,832	32,444·6
1852	35,923	
1853	30,396	
1854	41,799	
1855	48,465	
1856	32,080	
1857	35,404	
1858	40,102	
1859	37,620	
1860	34,137	
1861	44,777	47,471·3
1862	46,144	
1863	46,496	
1864	63,151	
1865	63,161	
1866	66,427	
1867	58,163	
1868	121,217	
1869	196,742	
1827 to 1869 ..	1,960,548	

The above Summary does not include sales by private contract, except those made through Messrs. Oppenheim. No figures as to other private sales are available, although no doubt they must have been considerable.

The second contention above advanced by the United States in favour of the suppression of pelagic sealing is that it produces an irregular supply, which is an undesirable circumstance for the fur trade, as it causes uncertainty and consequent speculation.

Pelagic sealing does not occasion irregular supply.

The admissibility of this plea in the decision of a question like the present, even if it were correct, is denied. But it is not correct. No doubt, in the last few years the variation in the supply and price has been considerable, but this is due to the result of the operation of the *modus vivendi*, and to exaggerated rumours of all descriptions circulated in connection with the present Arbitration and the antecedent negotiations. When these elements of uncertainty pass away, there is no conceivable reason why the seal-skin supply should not continue to be as even and constant as that of any other of the numerous furs dealt with in the trade. That the fears expressed are not shared by the fur traders of Great Britain and France is proved by the fact that, with the exception of the agents of the North American Commercial Company, and their partners in trade, Messrs. Martin and Sons, those engaged in the seal-skin business of Great Britain, and also the firm of Messrs. Révillon, of Paris, who do a business of 4,000,000 fr. yearly in seal-skins, are practically all agreed in stating that they are not in favour of the proposal that pelagic sealing should be suppressed. These men of business may be presumed to know their own interests, and they dread the existence of a monopoly which the proposed suppression of pelagic sealing might tend to create.

Appendix, vol. ii, pp. 230–253.

The third contention is, that there is little or no capital invested in the Canadian pelagic industry, and that, compared with fur-seal industries in other countries, the Canadian industry is scarcely worth consideration.

In advancing this contention, the Case of the United States throws doubt upon the official Returns as to the value of the Canadian fleet,

United States' Case, p. 276.

The value of the Canadian fleet.

made by Mr. Milne, Collector of Customs at Victoria, for the years 1889 and 1890, because the total value of the fleet and its value per ton in the year 1890 are in excess of those given for the year 1889. And the remark is made that it is difficult to see how the wear and tear of a vessel can appreciate its value.

It will be seen, however, on an examination of the documents in question, that in the year 1890 the number of the fleet had considerably increased, and not only this, but the new vessels added are of a higher class and of a much more costly description.

Appendix, vol. ii, p. 265.

The fact is, that each year competition produced its natural results. Owing to the demand for their services, skilled hunters became particular in selecting vessels in which they would serve, and they declined to go to sea in vessels which did not contain what they considered adequate accommodation and equipment. Also, the desire to obtain a better price for the skins caused the owners to construct the new vessels so that they should afford greater facilities for flaying and salting. These improved methods have had no doubt an important effect in enhancing the value of north-west skins.

United States' Case, Appendix, vol. ii, p. 500.

Mr. Milne's figures for the year 1889 are practically confirmed by Mr. T. T. Williams, a gentleman chiefly cited by the United States on the question of the value of the Canadian fleet, and he further testifies to Mr. Milne's honesty and correctness. It is true that he differs from Mr. Milne in the total of his values for that year, but the difference is not very considerable, and there is no reason for supposing that Mr. Williams, a San Francisco journalist, is on this point a better authority than Mr. Milne, who is an expert in such matters.

Present value.

British Commissioners' Report, pp. 106 *et seq.*

As regards the actual value of the fleet at the present time, the Canadian Fisheries' Report estimates the value for 1891 at 425,150 dollars, and the British Commissioners at 359,000 dollars. As, however, the tonnage increased from 3,261 tons in 1891 to 4,550 tons in 1892, the present value of the fleet on the basis of these two estimates would be about 572,908 dollars and 483,768 dollars respectively.

Appendix, vol. ii, pp. 215-219.

It is now, however, possible to replace these estimates by more exact figures. It will be seen that sworn statements have been obtained from the owners of all the Canadian schooners, and

the results will be found set out in a Table in the Appendix. The following is a Summary of the Table:—

Year.	Total Tonnage of Fleet.	Total Value.	Total Value of Outfit.	Average Value per Ton of the Fleet. On the Basis of the Value.	Average Value per Ton of the Fleet. On the Basis of the Value *plus* the Value of the Outfit.
		Dollars.	Dollars.	Dollars.	Dollars.
1891	3,261·87	365,100	194,728	111·92	171·69
1892	4,550·48	507,700	272,109	111·57	171·37

Value of United States' fleet

In this connection it is worthy of note that an estimate of the value of the pelagic fleet of the United States for 1889 is given in the United States' Census Bulletin, No. 123, 1891, and from this it appears that the value per ton, including outfit, is 160 dol. 54 c. This would tend to show, when the improved schooners of higher value, built in 1889, 1890, and 1891, are taken into account, that the value of 171 dol. 63 c. is not excessive.

The capital thus permanently sunk by Canada in the industry compares favourably with the capital similarly invested by Great Britain and by the United States. The capital permanently invested in London is represented by certain permanent plant, estimated by the United States at 80,000*l.* (400,000 dollars). The capital similarly engaged in the United States amounts to 100,000*l.* (500,000 dollars), but of this about 60,000*l.* (300,000 dollars) represents capital invested by United States' citizens in pelagic sealing, and only the balance of 40,000*l.* (200,000 dollars) is employed on or in connection with the islands. To the above-mentioned sum of 40,000*l.*, an addition no doubt must be made to cover the permanent plant of dyeing works in the United States, but as only a few thousand skins per annum are dyed there, this addition must be inconsiderable.

United States' Case, p. 273.

British Commissioners' Report, pp. 106 and 107.

General character of the fleet

A Memorandum is given in the Appendix by Mr. Gleadowe, of the British Treasury Department, who, in April 1892, was sent by the British Government to assess the amount of damage sustained by Canadian sealers by reason of the *modus vivendi* having been put into force after

Appendix, vol. ii, p. 265.

the seal season had actually commenced. Mr. Gleadowe's inquiry was in no way made in connection with the British Case or Counter-Case, and his Memorandum is confined to an explanation of the general position and character of the fleet.

Speaking of the sealing fleet generally, he states :—

"As regards the schooners, I have been much impressed with the excellence of the way in which, as a general rule, they are built and found in every respect. Compared with craft of a similar tonnage in other industries they are expensively fitted up, and everything about them appears good, more like yachts than fishing-boats."

The Memorandum explains that the schooners have accommodation for twenty or thirty men, and all are arranged and fitted in a way that would be out of place in an ordinary fishing or trading schooner.

Cost of construction.

In the United States' Case, Mr. Milne's estimate of 100 dollars per ton as the cost of building these schooners is questioned, and Mr. Williams' figures of 80 dollars are stated to represent more nearly the actual cost.

A reference to Mr. Gleadowe's Memorandum, however, will show that Mr. Milne does not exaggerate the cost. The Memorandum, after explaining that the best and most lasting vessels came from the Eastern States of Canada or America, or from Yokohama or some other port of Japan, states that the schooners engaged in the trade cost from 53 dol. 50 c. per ton up to 145 dol. 50 c. per ton.

Age of vessels.

As regards the age of the vessels, it is suggested in the United States' Case that a considerable number of the vessels of this fleet are old and unseaworthy; but from Mr. Gleadowe's Memorandum, it will be seen that the majority and the most valuable of the forty-four vessels into the value of which he inquired have been built within recent years :—

United States' Case, p. 276.

	Schooners.
1863, and previously	2
1868	1
1869	1
1872	1
1875	1
1877	3
1882	1
1883	4
1884	4
1885	2
1886	5
1887	1
1888	5
1889	4
1890	1
1891	9

The schooners useless for other trades.

That vessels engaged in sealing are specially constructed for the pursuit in which they are employed, and are unavailable for any other, is shown by the following extract from the affidavit of Richard Hall, Secretary of the Victoria Sealers' Association :—

"There is no coast trade they can engage in, and deep-sea fishing is so far a failure owing to the great distance from markets and great cost of transportation. That if the sealing business were stopped from any cause, the entire fleet now engaged in that pursuit would be practically valueless. It would cost more to take any one of the fleet to the North Atlantic coast than such schooner would be worth when there." **Appendix, vol. ii, p. 222.**

This is confirmed by the Report of the British Commissioners, who write :—

"The sealing-vessels are seldom used in or fitted for other employment, and nearly all of them remain laid up in harbour between the dates of the closing and opening of the sealing season." **British Commissioners' Report, para. 106.**

The schooner-owners.

Commenting upon the persons owning the schooners, the United States' Case states that they are as varied in their occupations as the purchasers of lottery tickets; and the same spirit which induces persons to risk their money in the latter has persuaded them to take their chance in the sealing business. **United States' Case, p. 285.**

The facts show that the persons owning the schooners are what one would expect them to be, viz., persons who would otherwise invest their money in coast shipping, and on this point Mr. Gleadowe states :—

"Some of them were old sailors, who have invested their money in a schooner and sail with her themselves, but the majority are men engaged in trade who have fitted **Appendix, vol. ii, p. 265.**

out schooners as they would invest their money in any other speculation."

It is submitted that the owners of schooners will bear comparison with the shareholders composing the North American Commercial Company, or any other mercantile undertaking.

Number of persons employed.

As regards the number of people employed in the Canadian industry (as distinguished from those owning or having interests in the schooners, or engaged in transportation), the Tables already referred to show that there are now employed in, and depending for subsistence upon, this industry 1,458 persons, viz., 1,007 whites and 451 Indians. As to the wages obtained by them, Mr. Gleadowe reports:—

Appendix, vol. ii, p. 265.

"The men employed upon a schooner are paid, some by fixed wages and some by commission or lay on skins taken, and some by both. Thus, cooks and seamen are generally paid wages only, and those high wages from 30 to 60 dollars a-month, besides board; but hunters, whether white or Indian, are paid by lay only, and the amount of each varies from 1 dol. 50 c. to 3 dol. 50 c. a skin, or even more, the average being about 3 dollars. . . . A good hunter may easily make 1,000 or 1,500 dollars in a season. . . . The captain and mate are paid mainly by wages, but also have, in addition, a small lay on the skins; the captain often gets 50 dollars a-month, and 25 cents or 50 cents on every skin taken by the schooner, and the mate 40 and 50 dollars a-month and a lay on every skin taken by the stern-boat, which is specially under his charge. . Where no lay is given the captain will get higher wages—in some cases 100 dollars."

The Indian hunters appear to be especially dependent upon the industry, and with reference to them Mr. Gleadowe writes:—

Ibid.

"In many cases, the enforcement of the *modus vivendi* deprived them of their only means of livelihood, and I cannot but fear, from what I heard from the Indian agent, that very great distress resulted in many Indian villages up the coast from prohibition."

For the reasons above given, it is submitted that the investment in Canada in pelagic sealing is substantial, and that the claims of those engaged in pelagic sealing—whose interests are directly involved in the decisions of this Tribunal—cannot with justice be neglected in the consideration of any Regulations which may affect the future of this important industry.

CONCLUSION.

It is submitted, that the facts detailed in the foregoing Chapters establish that if any regulations affecting pelagic sealing are to be made with a view to the protection and preservation of the fur-seals in or habitually frequenting Behring Sea, it will be necessary for their effective working that, concurrently with such regulations, there should be enforced proper limitations and restrictions upon the taking of seals upon the Pribyloff Islands themselves. That any regulations must be assented to by all nations whose subjects frequent, or are likely in the future to frequent, the waters of Behring Sea for pelagic sealing, and must be framed so as not unduly to restrict or interfere with the justifiable exercise by all nations of the industry of sealing at sea, which is in itself a perfectly legitimate method of obtaining the benefit of a natural product.

CHAPTER XIX.

Damages.

With reference to the claim for damages mentioned at p. 12 of the British Case, and the particulars set out in the Schedule thereto, Great Britain will claim, in addition to the amount there stated, the sum of 62,847 dol. 12 c., the amount of expenses incurred by the Government of Canada in connection with the proceedings before the Supreme Court of the United States, with the view of establishing the illegality of the seizure of the "Sayward"; and the Arbitrators will be asked to find that such expenses were incurred, and should be included in the amount of damages which Great Britain is entitled to claim. The Arbitrators will further be asked to find what catch or catches might have been taken by pelagic sealers in Behring Sea without undue diminution of the seal herds during the pendency of the Arbitration.

In connection with the latter claim, it will be shown that the Government of Great Britain have paid to certain Canadian owners of sealing-schooners the sum of 100,234 dollars as compensation for disbursements made by them in contemplation of a voyage into Behring Sea, which had to be abandoned by reason of the enforcement of the *modus vivendi* of 1891.